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RECORD, CASE NO. 15355.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 971.

JOHN HICKS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED JULY 22, 1893.

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court, in the case of United States vs. John Hicks, indicted for murder.

1 *Indictment.*

United States of America, western district of Arkansas, in the circuit court, November term, A. D. 1893.

UNITED STATES
vs.
JOHN HICKS AND STAND ROWE. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Hicks and Stand Roe, on the 13th day of February, A. D. 1892, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Andrew J. Colvard, a white man and not an Indian, then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault; and that the said John Hicks and Stand Roe, with a certain gun, then and there charged with gunpowder and one leaden bullet, which said gun they the said John Hicks and Stand Roe in their hands then and there held, then and there feloniously and of their malice aforethought, did discharge and shoot off, to, against, and upon the said Andrew J. Colvard, and that the said John Hicks and Stand Roe with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said John Hicks and Stand Roe discharged and shot off as aforesaid, then and there feloniously, wilfully, and of their malice aforethought, did strike, peretrate, and wound
2 him the said Andrew J. Colvard in and upon the left side of the breast of him the said Andrew J. Colvard, giving to him the said Andrew J. Colvard then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said John Hicks and Stand Roe in and upon the left side of the breast of him the said Andrew J. Colvard, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he the said Andrew J. Colvard then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Hicks and Stand Roe him the said Andrew J. Colvard in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 59. United States vs. John Hicks and Stand Roe. Murder. A true bill. Clyde C. Patton, foreman. Witnesses: W. J. Murphy, Ulm, I. T.; S. J. Christian, Ulm, I. T.; B. T. Christian, Ulm, I. T.; Wm. Bat, Oaks. I. T.; Alex. Cummings, 15 mi. north Talequah, I. T.; Lamech Smith, Oaks, I. T.; Eli Ingram, 8 mi. N. W. Talequah, I. *I.*; John Ingram, 8 mi. N. W. Talequah, I. T.; Eli Bat, Oaks, I. T.; Tom Bat, Oaks, I. T.; Robt. Murphy, Ulm, I. T.; Robt. Murphy, Ulm, I. T.; Stand Mixwater, Rose, I. T.; Tom Galcatcher, Oaks, I. T.; John Taylor, Talequah, I. T.; Dave Rogers, Oaks, I. T.; Tom Bat, Oaks, I. T.; W. T. Whittaker, Pryor Creek, I. T. Filed in open court, Nov. 21st, 1892. Stephen Wheeler, clerk, by I. M. Dodge, D. C.

3 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, November term, A. D. 1892. Monday morning, 8½ o'clock, November 21st, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* JOHN HICKS. } Indictment for murder, No. 59.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment, and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

Ordered by the court that this cause be, and the same is hereby, continued to the next term of this court and set down for trial Feby. 20, 1893.

FRIDAY, *Jan.* 27, 1893.

(Caption omitted.)

On this day come the defendant, by his attorney, and files his application in writing, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

Said application coming on to be heard, and the court being fully advised in the premises, doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Andy Hider, Jesse Starr, James Mouse, Clark Collins, Allen Hughes, John Goose, Robt. Dirt-eater, Switch Foreman, and Fayette Hughes, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them, returnable February 20, 1893.

4 FEBRUARY TERM, 1893, *Friday, March 3rd*, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford; and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause; and that the said defendant has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is on motion of plaintiff by its attorney ordered by the court that a jury come to try the issue joined. Whereupon after counsel for both plaintiff and defendant had exercised in the presence of the defendant, their full right of challenge, under the law, the following were selected for the trial of this cause, to wit, Henry C. Allen, Jas. K. P. Burnett, Thos. A. Conden, Wm. Crager, Lawrence Davenport, Reuben J. Laughlin, Jacob R. Raper, Jasper N. Stewart, Isaiah Wilkerson, Mark Sternberg, Wm. J. Williams, Jas. H. Smith. Twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause
5 they were put in charge of a sworn bailiff of this court. And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

SATURDAY, *March* 4, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit: Henry C. Allen, Jas. K. P. Burnett, Thos. A. Conden, Wm. Crager, Lawrence Davenport, Reuben J. Laughlin, Jacob R. Raper, Jasper N. Stewart, Isaiah Wilkerson, Mark Sternberg, Wm. J. Williams, Jas. H. Smith, who took their seats in the jury box, and after hearing further evidence, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

MONDAY, *March* 6, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford; and now come the jury heretofore empaneled for the
6 trial of this cause in charge of a sworn bailiff of this court: Henry C. Allen, Jas. K. P. Burnett, Thos. A. Conden, Wm. Crager, Lawrence

Davenport, Reuben J. Laughlin, Jacob R. Raper, Jasper N. Stewart, Isaiah Wilkerson, Mark Sternberg, Wm. J. Williams, Jas. H. Smith, who took their seats in the jury box, and after hearing the balance of the evidence, by agreement of counsel three hours on each side was allowed by the court for the argument of the case. And the jury having heard the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

TUESDAY, *March* 7, 1893.

(Caption omitted.)

On this day come the United States of America by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit: Henry C. Allen, Jas. K. P. Burnett, Thos. A. Conden, Wm. Crager, Lawrence Davenport, Reuben J. Laughlin, Jacob R. Raper, Jasper N. Stewart, Isaiah Wilkerson, Mark Sternberg, Wm. J. Williams, Jas. H. Smith, who took their seats in the jury box, and after receiving the charge of the court, retired in charge of the sworn bailiff aforesaid to consider of their verdict, and after some time returned into court the following verdict, to wit:

We, the jury, find the defendant John Hicks guilty of murder as charged in the within indictment.

(Signed) R. J. LAUGHLIN, *Foreman.*

7 Whereupon, by order of the court, the jury was discharged from the further consideration of the case, and the said defendant remanded to the custody of the marshal to await final sentence.

WEDNESDAY MORNING, *March* 29, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his motion to set aside the verdict of the jury, and for a new trial in this cause.

8 SATURDAY, *April* 29, 1893.

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, John Hicks, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause, on the 7th day of March, 1893, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid cause the said John Hicks to be taken hence, and him, the said John Hicks, safely and securely keep, from the date hereof, until Wednesday, the 12th day of July, A. D. 1893, and on that day and between the hours of nine o'clock in the forenoon and five o'clock

in the afternoon of said day, the said marshal cause the said John Hicks to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Wednesday, the said day of July, in the year of our Lord one thousand eight hundred and ninety-three, cause the said John Hicks to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

9 SATURDAY, *April* 29, 1893.

(Caption omitted.)

Ordered by the court that the defendant have until June 1st, 1893, to file his bill of exceptions herein.

MAY TERM, 1893, *Wednesday, May* 24, 1893.

(Caption omitted.)

On thi'd day come the said defendant, by his attorney, C. J. Frederick, esq., and tenders his bill of exceptions, and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

And the defendant also files his assignment of errors, and a petition for a writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

WEDNESDAY, *June* 27, 1893.

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error, taking this case to the Supreme Court of the United States, has been issued by the said clerk in this cause.

It is therefore hereby ordered by the court that execution of sentence, heretofore pronounced in this cause, be stayed pending the action of the Supreme Court.

10 *Bill of exceptions—Filed May* 24, 1893.

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
JOHN HICKS.

Be it remembered that on this, the 3rd day of March, 1893, came on to be heard the above-stated case.

The district attorney, representing the United States to maintain the issues on its part, introduced and examined the following-named witnesses: S. J. Christian, William J. Murphy, Ben. F. Christian, Robert Murphy,

William Batt, Eli Batt, Joe Downing, Dave Rogers, Jim Downing, Sam Bluebeard, Jim Rowe, John M. Taylor, John Ingram, Eli Ingram, William T. Whittaker, John B. Ingram, who testified as follows:

11 S. J. CHRISTIAN, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. State your name.

Answer. S. J. Christian.

Q. Do you know the defendant in this case, John Hicks?

A. I never seen him until the night of the dance down there.

Q. You know him now when you see him?

A. Yes, sir.

Q. Did you know Stand Rowe, the man who is jointly indicted with him, in his lifetime?

A. Yes, sir; I have seen him.

Q. The defendant, John Hicks, is charged in the indictment jointly with Stand Rowe with having killed a man by the name of Andrew J. Colvard, up not very far from Oaks Post-Office, in the Cherokee Nation, on the 13th of February, 1892?

A. Yes, sir.

Q. I will ask you if you knew Colvard?

A. Yes, sir.

Q. You have stated, I believe, you saw this defendant the first time at the dance?

A. Yes, sir.

Q. Where was that dance?

A. At Jim Rowe's.

Q. Please state if Jim Rowe was any relation to Stand Rowe?

A. They told me they were brothers.

Q. When was that dance at Jim Rowe's you speak of?

A. It was on the 13th of February, the night of the 12th of February, 1892. He was killed the morning of the 13th about 7 o'clock in the morning.

Q. What time did you get to the dance?

A. I expect it was about 8 o'clock when I got there.

Q. In the night?

A. Yes, sir.

Q. Do you remember whether it was a moonlight night that night?

A. I think the moon was shining. I won't be positive, but I

12 think it was.

Q. You got there about 8 o'clock?

A. Yes, sir.

Q. And you say you saw the defendant there?

A. Yes, sir.

Q. Was he there before you or after you?

A. I don't remember; I saw him directly after I got there, though.

Q. Please state if you saw Stand Rowe that night?

A. Yes, sir.

Q. Where did you see him?

A. He was there at Mr. Rowe's at the dance.

Q. Please state if they were armed?
A. Well, I couldn't say. The Winchesters were setting in the room, but I didn't see them put them in there.
Q. Did you see the Winchesters in the room?
A. Yes, sir.
Q. How many?
A. Two.
Q. You saw two Winchesters in the room?
A. Yes, sir.
Q. That is the room in which you were dancing?
A. No, sir; in the other room.
Q. You didn't see who put them in there?
A. No, sir; I did not.
Q. How long did you remain at the dance?
A. I was there about an hour and a half or two hours, I think. I think it was about 10:00 o'clock or a little after when we got back to Mr. Murphy's.
Q. Did you see Mr. Colvard there?
A. Yes, sir.
Q. What time did he come?
A. He come just as I was leaving.
Q. You do not remember whether Stand Rowe and the defendant got there before or after you did?
A. No, sir; I don't.
Q. You know you saw two guns in the room there, and you staid there an hour and a half and about the time you were leaving Mr. Colvard rode up?
A. Yes, sir.
13 Q. Where was Stand Rowe at the time that Colvard came, do you know?
A. No, sir; I don't.
Q. You didn't see them at that time?
A. No, sir.
Q. Where did you go after you left the dance?
A. I went down to Mr. Murphy's.
Q. How far is that from Mr. Jim Rowe's, the place of the dance?
A. I expect it is between three and four hundred yards.
Q. West, is it not?
A. Yes, sir; it is.
Q. You went to Mr. Murphy's?
A. Yes, sir.
Q. Did anybody go with you?
A. Mr. Murphy went with me.
Q. The old gentleman?
A. Yes, sir.
Q. Have you a son?
A. Yes, sir.
Q. What is his name?
A. Ben Christian.
Q. Has Mr. Murphy a son?
A. Yes, sir.

Q. What is his name?
Bob, or Robert.
Q. Where were they?
A. They remained at the dance the balance of the night. They staid all night.
Q. They staid at the dance and you and Mr. Murphy went to Mr. Murphy's house?
A. Yes, sir.
Q. You staid all night at Mr. Murphy's?
A. Yes, sir.
Q. Now, then, what time did you arise in the morning, the morning of the 13th?
A. I got up a little before sunup.
Q. You may commence from there now, and if you saw the killing you may state all about it from that point.
A. Well, I was there at Mr. Murphy's; him and me had just stepped out on the porch to wash——
Q. Had you had breakfast?
A. No, sir; we hadn't eat yet. And we heard somebody holler in the brush like——
14 Q. On the road, or left or right of the road?
A. To the right, coming down.
Q. From where you were?
A. He was to the left from where I was.
Q. That would be on the north side of the road?
A. Yes, sir; we heard then a whoop up there, and looked and seen him coming.
Q. Who?
A. Stand Rowe.
Q. How was he coming? Was he horseback or on foot?
A. Horseback.
Q. Was he armed or unarmed?
A. He had his Winchester laying down in front of him.
Q. How did he come--rapidly, or how?
A. No, sir; he rode in a walk; his horse was in a moderate walk down there.
Q. Was there a trail down there?
A. Yes, sir.
Q. He came down the trail?
A. Yes, sir.
Q. Go on.
A. I heard somebody hollo up the road and looked and seen Jack Colvard——
Q. Where did Stand Rowe go? What became of him?
A. He stopped down near the road, right close to the road, 6 or 7 feet from the road.
Q. When he got that far and stopped what did he do?
A. He stood there until these other men came up.
Q. He stopped down the road and stood there?
A. Yes, sir.
Q. Did he get off of his horse?

A. No, sir; he set on his horse.
Q. Which way was his horse facing?
A. Facing west.
Q. Not towards the road?
A. No, sir; not then.
Q. And you say he was 5 or 6 feet of the road when he stopped?
A. 7 or 8, I reckon; somewhere near that.
15 Q. You say you saw two other men?
A. Yes, sir.
Q. Which way were they coming?
A. They were coming right down the main travelled road.
Q. Did you say you heard a whoop?
A. They hollered; yes, sir.
Q. You heard a 'hoop from in the direction in which Stand Rowe came down the path or trail?
A. Yes, sir.
Q. How long after the 'hoop was it until you heard the other 'hoop down on the road?
A. Just a short time; a very short time.
Q. You heard a whoop down on the road?
A. Yes, sir.
Q. Please state if the last whoop was in the direction of Jim Rowe's house?
A. Yes, sir; coming right from Mr. Rowe's house.
Q. Then what did you see coming from there?
A. I seen Mr. Colvard and Hicks coming together down there.
Q. Go ahead.
A. Mr. Colvard got ahead of Mr. Hicks and came up in a lope on his horse and run a little past Mr. Rowe, and Mr. Rowe said hup! hup! standing with his horse right in front of him, turned his horse in front of Mr. Rowe, and then Mr. Hicks came up right by the side of Jack Colvard.
Q. How did he turn his horse?
A. Right fronting Mr. Rowe.
Q. How was Rowe's horse standing at that time?
A. Standing right west.
Q. That would throw his left side to them?
A. Yes, sir; like he was right out here [indicating].
Q. Throwing his left side to them, and their horses fronting Stand Rowe.
Q. Go ahead. When Colvard came down there and rode a little past Stand Rowe, Stand Rowe said hup! hup! and he faced his horse towards him, and then the defendant rode down to his side and faced his
16 horse, and that would put the defendant on the right side?
A. Yes, sir.
Q. Now, then, go on and state what occurred.
A. Then they talked there a little bit, and Mr. Rowe presented his gun at him.
Q. Did you hear what they said?
A. No, sir; I could not tell what they were talking about, but I understood Mr. Colvard to say, "Boys, I am a friend to both of you."

Q. You understood that?
A. Yes, sir.
Q. There was further talk, you say?
A. Yes, sir; something said, but I didn't understand it; I could not understand it, and he presented his gun——
Q. Who did?
A. Mr. Rowe.
Q. How did he present it?
A. He presented it at Mr. Colvard, and then took it back and laid it across his lap again, and then he presented it again.
Q. Did you observe anything at that time; did you hear the defendant say anything?
A. I heard him say, "Take your hat off and die like a man."
Q. When was that?
A. When he presented the gun the second time, I believe; as well as I remember, he told him to take off his hat and die like a man.
Q. Did the defendant do anything at that time?
A. No, sir; he took off his hat and hit his horse on the neck.
Q. With his own hat?
A. Yes, sir.
Q. The defendant took off his own hat and struck his own horse on the neck, and said what?
A. He said, "Die like a man," and then he presented the gun the next time, which was the third time, and Mr. Stand Rowe shot.
Q. Stand Rowe presented the gun the third time and fired?
A. Yes, sir.
17 Q. Let us see if I understand you up to that point: You got up and went out on the front porch, did you say, to wash?
A. Yes, sir.
Q. And you heard a whoop up the road—up on the trail to the north of the road?
A. Yes, sir.
Q. In a little while you saw Stand Rowe coming down that way until he got within 6 or 8 feet of the road, and then he stopped; and that, you say, was how far from Mr. Murphy's house?
A. About 100 yards.
Q. You then heard a whoop up the other road?
A. Yes, sir.
Q. And after awhile you saw the defendant and the deceased ride down, there riding together?
A. Yes, sir.
Q. When they got pretty near to Stand Rowe the deceased spurred up his horse and got a little ahead, and as he was riding by Stand Rowe you heard Stand Rowe say hup! hup! and then he turned his horse facing him, and then the defendant rode down and turned his horse facing Stand Rowe, to the right of the deceased?
A. Yes, sir.
Q. They were talking?
A. Yes, sir.
Q. You heard the deceased say, "I am a friend to both of you?"
A. Yes, sir.

Q. And then you saw Stand Rowe raise his gun and lay it down?
A. Yes, sir.
Q. You saw him raise it the second time and lay it down?
A. Yes, sir.
Q. You saw the defendant then takk off his hat and strike his horse and say to Colvard, "Colvard, die like a man?"
A. Yes, sir.
Q. And then Stand Rowe shot him?
A. Yes, sir.
Q. Now, what occurred?
A. Then his horse wheeled.
Q. Whose horse?
18 A. Mr. Colvard's. It wheeled right back, and he shot again, shot through his clothes, and he run about 114 steps, I believe, to where he fell off his horse, on the right-hand side.
Q. The deceased did?
A. Yes, sir.
Q. About 114 steps?
A. Yes, sir.
Q. What became of the other two men?
A. After he fell off they rode up a little drain, and went up a tolerable high hill in the woods.
Q. Together?
A. Yes, sir.
Q. In what direction?
A. Northwest, I think it is, they went off, as well as I remember.
Q. That was up a drain, was it?
A. Yes, sir; up a steep hill.
Q. Is there any road going up that way?
A. No, sir; there was no road.
Q. The two went together?
A. Yes, sir.
Q. Which way did the deceased's horse run?
A. He run back east towards Mr. Rowe's house.
Q. What became of his horse?
A. His horse stopped there and somebody went there and took the horse afterwards, and I do not know what they did with it.
Q. How did these two men who went off together ride, fast or slow, after the shooting?
A. They went off in a slow walk.
Q. Turned out of the road and went off in that direction?
A. Yes, sir.
Q. Went up a drain?
A. Yes, sir; went up to the top of a high hill.
Q. A gulch, is it?
19 A. Kind of a draw that went up on the hill, a big high hill.
Q. Are there any mountains up in that country?
A. It was what I think a mountain or a hill, this one was.
Q. There was no road on that hill, you say?
A. There was a road on the top of that hill.
Q. On the top of the hill they would strike a road?

A. Yes, sir.
Q. Where did that road go; do you know?
A. It went out to Saline Court-House, I believe.
Q. After the deceased fell off of his horse please state if you went to him, or who did.
A. I didn't go to him. Mrs. Murphy was so excited she begged me not to go, to stay at the house with her.
Q. Did you see anybody go to the body?
A. Mr. Murphy went down.
Q. Did you see anybody else?
A. There was several gathered in there, Cherokee boys. My son went down and helped put him in the wagon.
Q. Do you remember any of the Cherokee boys you saw there?
A. Yes, sir; I was acquainted with Mr. Bill Batt and Tom Batt and Eli Batt, and Switch Foreman was the first one that got to him.
Q. Did you see the body afterwards?
A. No, sir; I didn't go down to the house at all.
Q. You never did see it?
A. No, sir.
Q. You don't know of your own knowledge where he was shot?
A. No, sir.
Q. How far was Colvard standing from Stand Rowe when he was shot?
A. I don't think he could have been over 8 or 10 feet at the furthest.
Q. About as far as from you to I?
A. Yes, sir.
Q. I forgot to ask you whether the defendant had a gun with him that morning?
A. Yes, sir.
Q. What kind of a gun?
A. It was a Winchester.
Q. You saw two guns the night before at the dance, and that morning both of these men were armed with Winchesters?
A. Yes, sir.
Q. It was Winchesters you saw at the dance?
A. Yes, sir.
Q. Now, tell me where this killing occurred; what is the nearest post-office?
A. Oaks is the nearest post-office.
Q. How far is it from Oaks post-office?
A. Either 6 or 7 miles; I won't be positive; it is right there somewhere.
Q. In what country did this occur?
A. In the Cherokee country, Saline district.
Q. Cherokee Nation?
A. Yes, sir.
Q. How far from Tahlequah?
A. I don't know just exactly; I expect 25 miles, though.
Q. What direction?

A. It must be northwest, I reckon; I am not much acquainted in that country.

Q. This killing, then, occurred on the morning of the 13th of February, 1892?

A. Yes, sir.

Q. How long had you known Mr. Colvard?

A. About 12 months.

Q. Do you know where that trail leads to down which you saw Stand Rowe go just before the shooting?

A. No, sir; I don't; it leads up back a little peice that way is all I know.

Q. Did you hear anything else said there between these parties at the time the shooting occurred?

A. No, sir.

Q. You heard nothing except the deceased said "I am a friend to you both?

A. Yes, sir; that is all I heard.

21 Q. And the defendant told him to take off his hat and die like a man?

A. Yes, sir.

Q. That is all you heard, is it?

A. Yes, sir.

Q. When Stand Rowe would raise his gun the first and second time towards the deceased did the defendant do or say anything then?

A. No, sir; all I saw him do was just take off his hat, and said, "Die like a man." That is all I saw him do at all.

Q. When he took off his hat and struck his horse with it what was his manner?

A. As well as I remember I think he kind of laughed. He hit his horse on the neck three or four times.

Q. What was the other man doing at that time—at the time that he took off his hat and said "Die like a man," Stand Rowe?

A. He was on his horse there; had his gun there.

Q. In what position was his gun at that time, do you know?

A. I think he had it right in his lap.

Q. It was between the second and third time that he made the statement?

A. Yes, sir.

Q. How long after he said to Colvard, "Take off your hat and die like a man" was it that Stand Rowe shot him?

A. It wasn't long until he fired.

Q. How long; give us an idea?

A. It may have been a minute or two; somewhere along there.

Q. A minute is a good long while.

A. Well, they stood there and they were saying something, and I could not understand it at all what they were talking about then. It wasn't long then until he fired after he made that statement.

Q. Did this man Stand Rowe and the defendant leave right up that ravine before or after Colvard fell from his horse?

22 A. After he fell off of his horse. Just as he fell off they started.

Q. They staid on their horses?

A. Yes, sir.
Q. Did they look at him?
A. Yes, sir; they looked back at him.
Q. Looked back at him until he fell?
A. Yes, sir.
Q. Then turned and walked their horses off?
A. Yes, sir.
Q. Didn't go to the body?
A. No, sir.
Q. Neither one of them?
A. No, sir.
Q. Did the two leave together?
A. Yes, sir.
Q. Nothing occurred at the dance you know anything about?
A. No, sir.

Cross-examination by Mr. C. J. FREDERICK:

You had known this man Colvard about a year before he was killed?
A. Yes, sir.
Q. Is your name Christie or Christian?
A. Christian.
Q. You are not a citizen up there?
A. No, sir.
Q. You had only been in that country about a year at the time this thing occurred?
A. A little over a year.
Q. Where did you come from there?
A. From West River, near Vinita over there.
Q. You are not a citizen of the Cherokee Nation, are you?
A. No, sir.
Q. You came from some State, did you not?
A. I am formerly from Kentucky.
Q. What part of Kentucky did you come from?
A. Southern part; Union County.
23 Q. When did you leave Kentucky?
A. 13 years ago this last September.
Q. Are you married man?
A. Yes, sir.
Q. Did you bring your family with you from Kentucky?
A. Yes, sir.
Q. You came 13 years ago to the Indian country?
A. I lived in this State two years, and I moved to Missouri and staid there awhile.
Q. Whereabouts did you live in this State?
A. In Sebastian County, south of Greenwood.
Q. That is in this county?
A. Yes, sir. One year I lived in Washington County up here.
Q. Where did you get acquainted with Jack Colvard?
A. Well, I had seen him there, trading over there, bought cattle from my brother several times. I met him there several times.
Q. You say he bought cattle from you?

A. No, sir; not from me; he traded in cattle up there.
Q. He was running a store up there awhile, was he not?
A. Yes, sir.
Q. Were you ever at his store?
A. Yes, sir; I have been there.
Q. Was he running a store at the time he was killed?
A. I could not tell you whether he was or not.
Q. How long before he was killed was it that you were at his store?
A. It was four or five months, I reckon.
Q. Where was his store?
A. At Saline Court House.
Q. How far from where he was killed?
A. I think it was said to be about 9 miles, I believe, from where he was killed.
Q. What kind of a store was it that he run—what business was
24 it?
A. Just a common store.
Q. General mercantile business, general merchandise?
A. Yes, sir.
Q. Dry goods and groceries?
A. Yes, sir.
Q. Did he have a partner?
A. I don't know anything about that.
Q. You never saw any partner there?
A. No, sir.
Q. What was his name, this fellow that was killed?
A. Some call him Colvard and some Colbert; I don't know which his right name was.
Q. What did they call him?
A. They called him Jack.
Q. Jack Colvard?
A. Yes, sir; that is the name I heard for him.
Q. Was Jack Colvard a married man, did he have any family?
A. He has got three children.
Q. He has got no living wife?
A. I thin' his wife is dead.
Q. Do you know whether he was a white man or an Indian?
A. He must have been a white man, I suppose.
Q. Did you ever hear him talk in Cherokee?
A. Yes, sir; I have heard him talk Cherokee.
Q. You can't talk Cherokee, can you?
A. No, sir.
Q. Were you acquainted with Stand Rowe?
A. I never saw him until that night at Mr. Jim Rowe's dance.
Q. Did he talk English or Cherokee?
A. He talked both languages.
Q. Did you talk with him?
A. No, sir; I didn't talk with him.
Q. Why would he talk both languages when he talked to men who did not understand Cherokee?

A. I suppose he would talk English to them that didn't understand Cherokee.

Q. Did you hear him talk to Jack Colvard that night?

25 A. No, sir; I did not. I didn't hear him speak to him that night.

Q. Did you hear Colvard speak to him?

A. No, sir.

Q. Did you hear him talk to this defendant that night?

A. No, sir; I don't think I did.

Q. Did you hear this defendant talk to him?

A. No, sir.

Q. Was Stand Rowe there and not talking to anybody?

A. He was talking to the fellows he knew, I reckon; he didn't know me.

Q. Did you hear him talk to anybody at all?

A. Yes, sir; I could hear him talking, but I don't know what he said.

Q. Because you could not understand Cherokee?

A. I was not paying any attention to what he was talking about.

Q. You can not understand Cherokee, can you?

A. No, sir.

Q. Then you don't remember anything that Stand Rowe said there that night?

A. No, sir; I don't remember anything about it.

Q. And you don't remember anything that this defendant said there that night?

A. I never heard him speak a word that night.

Q. You don't remember anything that Jack Colvard said there that night?

A. No, sir; for I left there just as he came up.

Q. Did you speak to him as came up?

A. Yes, sir.

Q. How did he come?

A. He came up horseback.

Q. You said awhile ago you did not know which came first, didn't you, whether you went there first or Stand Rowe and Hicks; what do you think about it now?

A. I said they must have come shortly after I got there.

Q. You don't know whether they came together or not?

A. No, sir; I don't.

Q. Were either one of them taking any part in the dance?

A. They didn't while I staid there.

26 Q. Was there any dance going on while you were there?

A. Yes, sir; they were dancing.

Q. Were there many people there?

A. Yes, sir; a good many people there.

Q. Whites and Cherokees; you went there about 8 o'clock, and you staid there an hour or so?

A. Yes, sir; about an hour and a half or two hours, I think.

Q. And you and Mr. Murphy went on home together?

A. Yes, sir.

Q. You left your son and Mr. Murphy's son at the dance?

A. Yes, sir.

Q. Were you living at Mr. Murphy's?

A. No, sir; I was down at his house that night; we helped him work some.

Q. Murphy lives some three or four hundred yards west of Jim Rowe's, where the dance was?

A. Yes, sir.

Q. Now, the next morning, after you got up, while you were out on the porch you heard *heard* this man whoop; you and Mr. Murphy were out there to wash and you saw this man coming down the road?

A. Yes, sir.

Q. You heard him whoop, did you say?

A. Yes, sir; he whooped.

Q. Whooped or hollowed, which?

A. He whooped out there.

Q. Who was on the porch with you then?

A. Mr. Murphy and his boy and I about the same time.

Q. What is Murphy's name, the old gentleman?

A. William.

Q. What is his son's name?

A. Bob or Robert Murphy.

Q. Which went out on the porch first, you or the Murphys?

A. Mr. Murphy stepped out first and heard this hollering, and then he told us he heard somebody holler, and looked up the road and saw Mr. Stand Rowe coming down, and we all walked out together; just about
27 that time we all stepped out on the porch.

The DISTRICT ATTORNEY. Down the road, do you say, or down the trail?

The WITNESS. Coming down the trail.

Mr. FREDERICK (of counsel for defense). It was Mr. Murphy that heard the hollering and whooping?

A. I heard him whoop myself.

Q. Where were you when you heard it?

A. I was on the porch.

Q. Were you not in the house when Mr. Murphy came in and called to you?

A. I was standing in the door, and Mr. Murphy looked up the trail and saw that man coming, and just as we got out he whooped up the trail and come on down.

Q. Were you not in the house, and didn't Mr. Murphy go in the house there to you, you and your son sitting in there by the fire, and didn't Mr. Murphy come in there and say, "Here is one of those desperadoes out there on a horse?"

A. No, sir; I saw him coming down there myself.

Q. When you went out on the porch, who was out on the porch then?

A. Mr. Murphy and his boy and mine.

Q. You went out on the porch and you were the last of the four that went out?

A. No, sir; Mr. Murphy was the first one out there.

Q. That is what I asked you.

A. Didn't I tell you that he told us boys that Mr. Rowe was coming down the trail and he whooped up there, and after we got out he whooped again?

Q. I asked you who was on the porch when you went out there?

A. Mr. Bill Murphy.

Q. Then your son and Mr. Murphy's were not on the porch?

A. We all three went out.

28 Q. Did you all go out together?

A. I got out just a little bit before they did.

Q. Then no one was out there but Mr. Murphy when you got out?

A. No, sir; that is all.

Q. When you got out there, didn't you see this man, Stand Rowe, standing down there on his horse?

A. No, sir; he hadn't got to the place. He hadn't got down to where the shooting took place at all.

Q. How far was he from it?

A. I expect he was about 50 or 60 yards from where he stopped at.

Q. You saw him go to the place where the shooting occurred; travelled about 50 or 60 yards?

A. Yes, sir.

Q. What gait did he travel in?

A. In a walk; his horse walked along.

Q. While he was travelling that 50 or 60 yards, did you see anybody else down that way?

A. No, sir.

Q. You saw him go up to the place where you have indicated, where the shooting occurred, and stopped his horse, and set there on his horse with his Winchester across his lap?

A. These other men had started to come before he got entirely still.

Q. Before he got to the place of the killing, then you saw these other men coming?

A. Yes, sir.

Q. How far away were they?

A. Well, I expect they were 150 yards.

Q. Then they were about 50 yards from him?

A. Yes, sir; maybe 100 yards from him when I first seen them.

Q. When he went and stopped there 100 yards from you?

A. Yes, sir.

29 Q. If it was only 150 yards from where you were to where the other men were——

A. From where Mr. Rowe stopped at was where the 100 or 150 yards were.

Q. You say you saw Colvard ride in a gallop?

A. Yes, sir; in a lope, as well as I remember.

Q. Coming down towards where Stand Rowe was?

A. Yes, sir.

Q. How far behind him was Hicks, the defendant?

A. Well, I don't know that I could tell exactly; he wasn't a great ways, though.

Q. You can give me an idea?

A. May have been 30 feet behind him, and maybe a little further, and maybe not so far.

Q. What gait was Hicks travelling?
A. I think in a little jog of a trot.
Q. Hicks was about 30 feet behind him in a jog of a trot, and Colvard was galloping or loping on his horse, coming towards where Rowe was?
A. Yes, sir.
Q. How far apart were they not; how far from Colvard at the time you first saw him, from where Rowe was?
A. I judge 140 or 150 yards.
Q. Did Colvard travel that 140 or 150 yards in a lope?
A. He commenced loping—no, not all the way, he didn't; he struck a lope just before he got to Mr. Rowe's place where he was standing.
Q. When you first saw him he was not in a lope?
A. No, sir.
Q. He afterwards got in a lope?
A. Yes, sir.
Q. He must have been in sight of Stand Rowe at that time?
A. It was open woods and you could see very plain; there was
30 but very little timber in there.
Q. Of course Colvard was coming towards Stand Rowe in a lope on his horse?
A. Yes, sir.
Q. He could see Stand Rowe plain enough, couldn't he?
A. Yes, sir; I guess he could; nothing to hinder; Stand Rowe standing there on his horse; he was off the road a little piece to the right.
Q. There was nothing to obstruct the view, was there?
A. No, sir; there was not, I think.
Q. When Colvard got up to where Stand Rowe was, Stand Rowe said hup, hup; how far behind was John Hicks?
A. Well, he wasn't very far.
Q. Well, about how far?
A. Might have been 30 or 40 feet.
Q. Was it not 30 or 40 yards?
A. No, sir; about 30 or 40 feet, as well as I remember; it looked to me like it was about that far.
Q. What distance?
A. About 30 or 40 feet.
Q. That would be about 10 or 12 steps, would it not?
A. Yes, sir; I suppose it was.
Here court took a recess until 1:30 p. m.

AFTERNOON SESSION.

Continuation of the examination of S. J. Christian.

By Mr. FREDERICK:

You say you left your boy and Mr. Murphy's boy up at the dance when you left to go home that night?
A. Yes, sir.
Q. When did they get home?
A. They got in a little after daylight.
Q. How long after they came until you saw this man, Stand
31 Rowe, and heard him whoop?
A. About an hour, I suppose; somewhere's along there.

Q. Do you think it was as much as an hour?
A. Yes, sir; it must have been an hour; somewhere about that time.
Q. Were you up when they came?
A. Yes, sir.
Q. Was it not just a few minutes after they came that you saw this man Stand Rowe riding down?
A. No, sir; it was some time; it must have been an hour.
Q. You think it was as much as an hour?
A. Somewh'res about an hour, I think.
Q. I asked you before noon, but I do not rememb'r the answer, whether or not you spoke to Jack Colvard that night when he rode up?
A. Yes, sir; I spoke to him.
Q. Did Mr. Murphy speak to him?
A. Yes, sir.
Q. Have any conversation with him?
A. No, sir; just spoke and passed on.
Q. What did he say?
A. He spoke to Mr. Murphy and asked him if he was leaving, and he said yes; and he said he hadn't better leave yet, stay awhile. That is all that passed that I remember.
Q. Didn't he beg you to stay?
A. He just said we had better stay awhile, is all I remember hearing at all, and Mr. Murphy told him no, we had started home and we would go on home now.
Q. Was it a cold morning?
A. Well, it was not very cold; tolerable cool.
Q. Did you have a fire at Mr. Murphy's?
A. Yes, sir.
Q. You were sitting around the fire, I suppose, when the boys came home?
A. Yes, sir.
Q. Were you not sitting around the fire when you were informed
32 there was one of those desperadoes coming?
A. I said that Mr. Murphy stepped out, and when he stepped out I was right after him; he was a little ahead of me when Mr. Rowe hollowed, gave a whoop up the hill there; after I stepped out he whooped again.
Q. Do you remember hearing Mr. Murphy say, "Boys, yonder comes one of those desperadoes we saw last night?"
A. Yes, sir.
Q. Who was he talking to?
A. To his boy, and mine, and me.
Q. You all came out when he said that, didn't you?
A. Yes, sir; I beat the boys out just a little bit.
Q. I say, when he said that you all came out?
A. Yes, sir.
Q. How long did he set on his horse there before any one came to him?
A. It wasn't a great while; I don't know exactly how long it was, but it wasn't long, though, until they got there.
Q. Was it as much as 10 minutes?
A. No, sir; it wasn't that long.

Q. Was it as much as five?
A. It was somewheres near five minutes, I expect.
Q. Did Jack Colvard come down the road?
A. Yes, sir.
Q. Didn't he come out of the road?
A. Out of the road?
Q. Yes, sir; didn't he come down a little out of the road?
A. Just before he got there I think his horse got a little out of the road.
Q. Then did he not wheel his horse into the road when he got down to where Colvard was?
A. He just got passed him a little bit when he got his horse in the road.
Q. Wheeled his horse around, facing Mr. Colvard?
A. Facing Mr. Rowe, Mr. Colvard did.
Q. Yes; Colvard facing Rowe. What was Rowe doing when
33 he wheeled his horse around facing him?
A. Sitting on his horse with his Winchester laying before him on his saddle.
Q. How long after that until this defendant, John Hicks, came down?
A. It wasn't but a little while.
Q. How did he face his horse; how did he stand his horse?
A. Just to the right.
Q. By the side of this defendant?
A. Yes, sir.
Q. Was it not by the side of Colvard? John Hicks wheeled his horse around by the side of Mr. Colvard?
A. Yes, sir; on the right-hand side of Mr. Colvard.
Q. And they were both then fronting Rowe?
A. Yes, sir.
Q. They talked there then quite a little while, didn't they?
A. Yes, sir; quite a little while.
Q. Were they drinking?
A. Well, sir, I could not say whether they were or not.
Q. You do not know?
A. No, sir; I don't know.
Q. When was it that Colvard said to him, or to them, "I am a friend to both of you?
A. Just before he shot; I think it was the second time he presented the gun.
Q. Rowe had already pulled up his gun twice before then and aimed it at him?
A. Yes, sir.
Q. What did this defendant Hicks do?
A. He just took his hat off, and hit his horse on the neck, and told him to die like a man.
Q. How far were you from him when he said and did that?
A. I was about 100 yards.
Q. Could anybody else see that?
A. Yes, sir.
Q. How close was Hicks to Colvard when he said that to him?
A. They were right close together.
34 Q. In touch, in reach, were they not?

A. No, sir; they could not touch one another, I don't think.
Q. He said it loud enough to hear it 100 yards?
A. Yes, sir.
Q. Did he speak English or Cherokee?
A. English.
Q. Did you go down to where Colvard was after he fell off of his horse?
A. No, sir.
Q. You never went to him?
A. No, sir.
Q. You don't know who the people were that came down to him then?
A. Yes, sir; I know the most of them.
Q. If you didn't go down there—I mean could you tell who the people were when they come down there?
A. Yes, sir.
Q. He had gone 114 yards back towards Jim Rowe's?
A. Yes, sir.
Q. That made him 214 yards from you?
A. Yes, sir.
Q. You could see them from there and tell who they were?
A. Yes, sir.
Q. How often did the defendant strike the horse with his hat?
A. He made two or three licks, as well as I remember.
Q. Where was Mr. Murphy when he did that?
A. He was on the porch.
Q. Standing by you?
A. Yes, sir; out on the porch.
Q. Looking down that way?
A. Yes, sir.
Q. Where was the young man Robert Murphy?
A. He was out there too.
Q. He was looking down that way too, was he?
A. Yes, sir.
Q. He could have seen it too, young Robert Murphy, if the thing occurred?
A. Yes, sir.
Q. He had the same opportunity you did?
A. Yes, sir.
Q. You say you have been to Colvard's store?
A. Yes, sir.
35 Q. You don't know whether he had any partner or not?
A. No, sir; I don't.
Q. How long did he run the store there; was he running it when you first went there?
A. Yes, sir; I think, though, he had sold out; that was after I had been there I heard that he had sold out.
Q. Who were the salesmen in the store? Would he wait on customers?
A. There was a clerk in there when I was there.
Q. You saw Colvard there?
A. Yes, sir.

Redirect examination:

The DISTRICT ATTORNEY. What was the clerk's name?

A. I think it was a brother of Mr. Colvard; I don't know what his name was; a brother of Jack.

Q. Did you see any drinking down at the dance that night?

A. No, sir; I didn't.

Q. Did you hear Hicks say anything after that first shot was fired?

A. I heard something, but I could not say which one of them said it.

Q. What was it you heard?

A. He said "Run up on the damned son of a bitch, and shoot him again."

Q. You don't know which one it was that said it?

A. No, sir.

Q. It was one of the two, was it?

A. Yes, sir.

Q. That was after the last shot was fired?

A. Yes, sir; it was while the horse was running and before he fell off.

(Witness excused.)

36 WILLIAM J. MURPHY, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. State your name, please.

Answer. W. J. Murphy.

Q. William?

A. Yes, sir.

Q. Where do you live?

A. I live in the Cherokee Nation.

Q. How far do you live from Jim Rowe's place?

A. About 414 steps, I think.

Q. Have you stepped it?

A. Yes, sir.

Q. You live 414 steps west of Jim Rowe's?

A. Yes, sir.

Q. I will ask you if you were at the dance on the night of the 12th of February?

A. Yes, sir; I was there about an hour and a half, I reckon.

Q. 1892?

A. Yes, sir.

Q. Who did you go with, or who went with you?

A. I went with Mr Christian.

Q. Where did you fall in with Mr. Christian?

A. We left my house together.

Q. He came to your house, did he?

A. Yes, sir.

Q. Was he living there, staying there, at that time?

A. He was doing some work there; me and him worked some clearing.

Q. You went down to the dance?

A. Yes, sir.

Q. What time did you get down?

A. It was a little after dark.

Q. I will ask you if you at that time knew the defendant, John Hicks?
A. No, sir.
Q. Did you know Stand Rowe?
A. No, sir.
37 Q. Did you see them down there?
A. I saw two men they showed me for John Hicks and Stand Rowe?
Q. Did you notice whether they were armed when you saw them?
A. Yes, sir; they both had Winchesters when they pointed them out to me.
Q. Both had Winchesters?
A. Yes, sir.
Q. What time did you leave to go home?
A. Well, I suppose we staid an hour and a half or two hours; I think it was 10 o'clock when I got back home, maybe.
Q. Did Mr. Christian go back home with you when you went back home?
A. Yes, sir.
Q. Did he stay all night with you?
A. Yes, sir.
Q. You have a son, I believe; have you not?
A. Yes, sir.
Q. What is his name?
A. Robert L. Murphy.
Q. Did he go back home with you?
A. No, sir; he did not. I tried to get him to go; I begged him to go, and he wouldn't go, and I went off and left him. He come home the next morning a little after daylight.
Q. Did anybody come with him?
A. Mr. Christian's son came with him; they were both working at my house.
Q. He staid all night?
A. Yes, sir.
Q. Please state if there was any drinking down there when you were down there.
A. I didn't see anybody drinking anything. I saw a man down and they said he was drinking; I never went and examined him at all.
Q. Did you see anybody else that appeared to be drinking?
A. No, sir; I didn't notice anybody else that acted like they were drunk.
Q. Please state if the moon was shining when you were there.
38 A. Yes, sir; I think it was.
(Here the district attorney stated that the almanac showed that on the night of the 13th of February, 1892, the moon rose at 6:43 p. m. in New Orleans latitude.)
Q. You saw one man drunk, and you say these two men were pointed out to you and they had their Winchesters?
A. Yes, sir.
Q. I will ask you what time you arose the next morning?
A. I arose a little before sunup.

Q. I intended to ask you before we get to the next day, if you saw Mr. Andrew J. Colvard there?

A. When I got ready to start home I got over the fence and Mr. Colvard had just gotten down off his horse, and he shook hands with me, and asked me where I was going, and I told him I was going home. He begged me not to go; said not to go, stay longer, and I said to him, No, my wife was by herself and I had to go home; I had enough of the dance.

Q. They were dancing at that time?

A. I suppose they were; I had just left the house.

Q. You had seen them dancing?

A. Yes, sir.

Q. Did you participate in the dance?

A. No, sir; I did not.

Q. You may go on now to the next morning. I will ask you what time you got up?

A. Somewhere between daylight and sunup.

Q. Had your son Ben and the Christian young man got home yet?

A. No, sir; they never got home until after I got up?

Q. You got up and they came home after you got up?

A. Yes, sir.

Q. You may go on from there and state what occurred.

A. Well, we set around the fire after these two boys came home until my wife got breakfast about ready, and she called to us to get ready for breakfast.

39 Q. Had the boys got home then?

A. Yes, sir. I says, "Boys, let's wash," and stepped out on the little porch in front of the door, and I heard someone whoop up next to the hill like, or hollow, and I looked around and I saw a man coming riding down the road, and I says to the that was in the house, "There comes Stand Rowe, that desperado they showed me last night for Stand Rowe, with his gun in his lap;" and then they all stepped out on the porch, and he rode up, and here is the trail that he come, and the trail come to the main road, right this way.

Q. That trail is on the north of the main road, is it not?

A. Yes, sir; I think it is. He rode up, it looked like, in about 6 feet of the main road, and stopped his horse with his head towards my house.

Q. Was he riding fast or walking?

A. Riding in a slow walk.

Q. Stopped his horse with the horse's head toward your house?

A. Yes, sir.

Q. His horse would be parallel with the road?

A. Yes, sir.

Q. How far from the road?

A. About 6 feet or 7, as near as I can guess at it. And he stopped there a few minutes, and I looked up the road then and I saw two other men coming riding down the road. I could see nearly to Jim Rowe's house from my house. I could not tell in the distance who it was until they got closer. When they got in about 50 or 60 yards of where this man was standin' on his horse Mr. Colvard came in, kind of dashed, on his horse.

Q. Did they come together that far?

A. They come together until he came in a dash on his horse.

Q. Who were the two men who came together?

A. Mr. Colvard was the first man that got to this man that done the shooting.

40 Q. Who was the other man?

A. It was said to be Mr. Hicks; was showed to me for John Hicks.

Q. The two were coming down side by side until they got in about 60 yards of where Stand Rowe was sitting on his horse?

A. Yes, sir.

Q. Then Colvard made a little dash ahead?

A. Yes, sir; he got there a little first; he ran a little past Stand Rowe and he wheeled his horse around, and Stand Rowe said, "Hup! hup! hup!" just that way, and he turned his horse right square across the road, fronting that way, and set there and talked until Mr. Hicks came riding up.

Q. What did Mr. Hicks do?

A. He stopped his horse right by the side of Colvard's horse, on the opposite side from my house.

Q. Which way was his horse fronting?

A. Fronting Stand Rowe.

Q. These two men were fronting Stand Rowe?

A. Yes, sir.

Q. Stand Rowe was about 6 or 7 feet this side of the main road, sitting on his horse, with his horse's head toward your house?

A. Yes, sir.

Q. And the other two men were in the road; were their horses froßnting him?

A. Yes, sir.

Q. What occurred after he came there?

A. They talked a few minutes, and he taken his gun——

Q. Who did?

A. Stand Rowe took his gun up and taken aim at Colvard, and then studied for a little bit, and then laid it down in his lap, and Mr. Hicks laughed a dry laugh, "Ha! ha! ha! ha!" just that way, and then they talked awhile again.

The COURT. What did they say?

A. I could not understand their conversation.

41 The DISTRICT ATTORNEY. You were 100 yards from them?

A. Yes, sir; 100 steps. I stepped it two or three times, just to know the distance. They talked awhile there, and Colvard was laying it off with his hand like he always talked with Cherokees; and then Stand Rowe pulled his gun up and pointed it the second time, took aim, and he laid it in his lap again, and Mr. Hicks laughed again; and the third time he pulled it up, when he pulled it up he didn't hold it long; just as soon as he got it straight he shot him.

Q. Did Hicks do anything before that?

A. Mr. Hicks took his hat off his head a little before that and made the remark, "Take your hat off and die like a man." Spoke it very loud—something to that effect, like he was angry, and the horse wheeled then to the right, as well as I recollect.

Q. Did the horse wheel before he was shot?

A. No, sir; after he was shot.

Q. It was before the third shot that Hicks took off his hat and struck the horse and said to Colvard, "Die like a man"?

A. Yes, sir; something to that effect; that is the way I taken it. He had his hat in his hand and he struck the horse; then the shot fired, and the horse wheeled, and I didn't know whether it struck him or not; he threw himself forward in the saddle, and by the time the horse got straight he was running—about the time that the horse got straight, as quick as he could throw the hull out, he throwed it out and shot again.

Q. Who did?

A. Rowe did; the same man. His horse ran 114 steps. I stepped that. And he fell off on the right-hand side of the road, fell against a bush and broke it down. The bush is there yet, broke down. I
42 started to go to him, and my wife was scared to death and begged me not to go; they were standing there on their horses, and she said they might shoot me. I stepped back on the porch—I had got out in the yard at that time.

Q. What became of these two men?

A. As soon as he fell off of his horse they both rode off, up a little hill or mountain, and went up on the hill.

Q. What direction does that hollow run?

A. I think it is about north of where they were *they were* standing.

Q. How did they go?

A. They rode off in a slow walk.

Q. They waited until Colvard fell off of his horse?

A. Yes, sir.

Q. What direction were they looking when he fell?

A. They were looking at him, right back the way his horse ran.

Q. They looked at him until he fell, and then turned and went up this ravine, and then up on the hill?

A. Yes, sir.

Q. You say your wife was scared and you didn't go down there at once?

A. No, sir; I didn't go right immediately.

Q. Did you go after awhile?

A. Yes, sir; I stood there watchi'g him to see whether he moved, tried to get up or not, and he did not; and Switch Foreman came to him and turned him over, and then turned around and went back to Jim Rowe's, and then Jim Rowe and Bill Batt——

Q. Switch Foreman is not here?

A. Yes, sir; he is here; and Eli Batt, and Tom Batt, and Jim Rowe, and Dave Rogers, and I think Foreman was with them—there was that many anyhow; they came back, and we got there just a few minutes after, and I walked up.

Q. What direction did he come from?

A. From Jim Rowe's house.

Q. From where the dance had been the night before?

A. Yes, sir.

43 Q. This killing was between your house and Jim Rowe's?

A. Yes, sir.

Q. When he was wounded he rode back towards Jim Rowe's?

A. Yes, sir; 114 steps.

Q. That would take him about halfway?

A. Yes, sir; about halfway.

Q. Did you examine him when you got to him; was he dead?

A. He worked his swallow twice after I got there; he was laying on his back. They pulled his bosom open, and I saw then where he was shot; they shot him right about here [indicating in breast].

Q. Do you know whether the bullet went through?

A. Yes, sir; I think it went straight through him. I hauled him home, and pulled his overcoat off of him and his boots and belt, and the hole was on the back side the same as on the front side.

Q. Was there any other hole about him?

A. One had struck his clothes only; the second shot.

Q. Show how that was.

A. It went right through this way; cut his clothing, I think; cutting his undershirt without cutting his body. [Witness indicates that ball entered clothes on the body of deceased on one side of the person, in front, over stomach, and passed out of clothes at the other side.]

Q. The other hole went through him?

A. Yes, sir.

Q. You saw him when the first shot was fired, and he was facing the man who fired?

A. Yes, sir.

Q. Whereabouts did that first shot enter?

A. As well as I recollect it was right about here [indicating].

Q. That is a little to the left of the middle of the breast?

A. Yes, sir.

44 Q. About on a range with the nipples?

A. Yes, sir.

Q. You say he just made two swallows after you got there?

A. He worked his swallow twice up and down that way; twice after I got there.

Q. And then died?

A. Yes, sir.

Q. How far did you see these men when they rode off together?

A. I saw them until they got halfway up the hill.

Q. Did the deceased have any arms?

A. I never seen any.

Q. You went up there to where he was?

The COURT. Do you have reference to after the shooting—when they went off up the hill after the shooting, the defendant and Stand Rowe?

The DISTRICT ATTORNEY. Yes, sir; they turned and waited until the deceased fell from his horse, and then they turned their horses and went up the ravine. (To the witness.) Was there any road where they went, in that direction; were they in a road when they went off there?

A. No, sir; they went off through the woods; there was a road after you get up on top of the hill.

Q. There were just two shots fired, and Stand Rowe fired those two shots?

A. Yes, sir.

Q. What time in the day was this?

A. I suppose the sun was an hour or an hour and a half high, as near as I can guess at it.

Q. At the time the shooting occurred?

A. Yes, sir.

Q. Do you remember the day of the week, the month, and the year?

A. It was the 13th of February of last year.

Q. That would be 1892?

A. Yes, sir.

Q. The 13th of February, 1892, was Saturday by the almanac?

A. I think that was the day it was.

45 Q. Then the dance was on Friday night, the 12th of February, 1892?

A. Yes, sir; on Friday night.

Q. Is that all you know about the case?

A. Yes, sir; that is all I know about the case.

Q. Did you ever see Hicks and Stand Rowe again?

A. I never saw Stand Rowe any more; I never saw Hicks until I saw him here at the commissioner's office.

Q. After he was arrested?

A. Yes, sir.

Q. You don't know what became of Stand Rowe?

A. No, sir; I understand they killed him; I don't know whether they did or not.

Cross-examination by Mr. C. J. FREDERICK:

Q. How long had you known Jack Colvard?

A. I had not known him only about two or three months.

Q. What acquaintance had you had with him?

A. Well, he was trading, kind of a trading man, and had been riding through there several times; been at my house several times. That is all the acquaintance I ever had with him.

Q. Did you ever trade with him at his store?

A. No, sir; I never did.

Q. You were never at his store?

A. Not until I took him home. I understood that he had sold out at that time. I went in the store, but then they said he had sold out a good while before that.

Q. Did he talk the Cherokee language?

A. I reckon he did. I can not understand the Cherokee language. He talked some other kind of language besides English.

Q. When he talked to Cherokees he talked some language you

46 did not understand?

A. Yes, sir; they said he could talk good Cherokee language.

Q. Do you know whether he was a Cherokee or not?

A. No, sir; I do not.

Q. You had no acquaintance with Stand Rowe, did you?

A. No, sir; only that night they pointed him out to me, by them being with these guns. I took a good look at the men. They danced one set while I was there, and they had a big fire out in the yard, and of course like all other men, if a man is called a desperado, and he comes around where all is he wants to see him.

Q. You took a good look at Stand Rowe, then?

A. Yes, sir; and I was well acquainted with his brother Jim Rowe; I had been living a neighbor to him.

Q. You had no acquaintance with Jom Hicks?

A. Not until that night.

Q. You never had heard him called a desperado, I reckon?

A. That is what they called the two, the men that showed them to me. I didn't know anything about them at all. I had heard of these desperadoes.

Q. You had heard of Stand Rowe being an outlaw?

A. Yes, sir.

Q. But you had not heard of John Hicks as an outlaw?

A. All I heard of him was that he was on the scout for whiskey.

Q. You understood that Stand Rowe was scouting for murder?

A. Yes, sir; that is what I understood.

Q. Did you talk with Stand Rowe any that night?

A. No, sir.

Q. Did you hear him talk?

A. No, sir.

Q. Did you hear Hicks talk?

A. No, sir.

Q. Do you know whether either one of them spoke English or not?

A. Not that night; I do not.

47 Q. Do you know whether they could speak English or not?

A. No, sir; only by what they told me; I understood they both could talk English. His brother told me that Stand could talk English.

Q. You never heard them talk English?

A. No, sir; I did not have any conversation.

Q. Did you hear them talk Cherokee or any other language not English?

A. No, sir.

Q. You say Stand Rowe danced one dance, one set or reel, or whatever you call it?

A. Yes, sir.

Q. What did Hicks do?

A. He stood in the door, or right at the door. I was standing about—well, I was right against him while Stand Rowe was dancing the dance.

Q. You did not see but one drunken man there?

A. No, sir; I don't know he was drunk; he was laying down; they said he was drunk. I didn't go and examine him at all.

Q. You saw no other drunken person there at all?

A. No, sir.

Q. You went home and left your boy and Christian's boy—what is his name?

A. Ben Christian.

Q. You left your son Robert and Ben Christian there?

A. Yes, sir.

Q. They came home next morning. What time did they get home?

A. They got home between daylight and sunup; I could not tell exactly the time, but somewhere between daylight and sunup.

Q. After you had gotten up?

A. Yes, sir.

Q. You say your wife had prepared breakfast and she said to you to wash and get ready for breakfast, and you stepped out on the porch to wash and you saw this man Rowe?

A. He hollered, and I saw him after he hollered.

48 Q. Was there any one with you then?

A. Christian stepped right out behind me. I don't know whether he was there when he hollered or not. I didn't look around to see. I know I said, "There comes that desperado Stand Rowe, with his Winchester in his lap."

Q. Didn't you turn into the door and say, "Boys, there comes that desperado we saw last night?"

A. I spoke that word.

Q. Who were you addressing?

A. They were there in the house—Christian's son, and my son, and Christian himself.

Q. If Christian was standing out he could see it, and it was not necessary to call his attention to it, of course; was he out there?

A. I don't know whether he was or not. I could not say whether he was or not. I know he was there a very few minutes after he rode up, if he wasn't out there as he came up.

Q. How was Rowe travelling then, fast or slow gait?

A. He came in a slow walk on his horse.

Q. He came down some five or six steps or feet from the road, which was it?

A. As near as I can guess at it, it was five or 6 steps. When Colvard came up there he ranged his horse a little further from the road than he had first stopped.

Q. How long had he been there when Colvard rode up?

A. Not very long. I don't suppose he had been there five minutes. That is as near as I can come at it. It was a very little while, though.

Q. Didn't he set on his horse for about 10 minutes before anyone came to him?

A. I could not tell; I didn't look at the time. I was just guessing at the time. It may have been, of course, ten minutes, and it may have been five. It may not have been that much.

Q. You testified before Col. Brizzolara, the commissioner in this case, didn't you, last September?

A. Yes, sir.

49 Q. Did you testify there then that he set on his horse for about ten minutes before anybody came to him?

A. Something near ten, I might have told him.

Q. How did Colvard come?

A. He come pretty fast; left the road a little piece and came down a little faster than in a lope.

Q. Was there anybody with him when he came?

A. There was not when he came right to Stand Rowe; he had left Mr. Hicks on the road.

Q. How was Hicks travelling?

A. In a slow walk.

Q. Colvard was in a gallop, was he not?

A. Yes, sir; it may have been a little faster than a lope.

Q. Had you seen Hicks and Colvard together before you saw Colvard leave Hicks, or did you see Colvard leave Hicks at all?

A. I saw him leave the man that rode up with him afterwards. I stood right there until they got there.

Q. How far from where Stand Rowe was was it that he left Hicks?

A. I suppose it was, maybe, 60 yards.

Q. He galloped his horse for about 60 yards?

A. Yes, sir; he came pretty fast.

Q. Hicks rode along in a slow walk?

A. Yes, sir.

Q. When he got up to where Rowe was, you say that Rowe said to him, "Hup, hup!"

A. Yes, sir; he said that, only a little faster than you say it; "Hup! hup! hup!" and when Colvard wheeled his horse around he like to fell off of his horse.

Q. You don't know what Colvard said to him?

A. No, sir.

Q. You don't know whether he was talking Cherokee or English to him?

A. No, sir.

Q. Did you hear Stand Rowe say anything to him?

50 A. I could hear him talk, but I could not understand the language at all.

Q. Did you hear Hicks say anything?

A. Yes, sir; I heard Hicks say that word, when he pulled his hat off and struck his hat. He pulled his hat off and spoke that very loud—above a common tone of voice.

Q. How close was he to him—that is, to Colvard and Stand Rowe—when he said that?

A. He was standing with his horse by the side of Colvard; I suppose he might have been three or four feet. He was standing, though, by the side of him.

Q. Did you testify to that before the commissioner?

A. No, sir; I didn't.

Q. Why didn't you?

A. I never thought of it until I came down stairs, and Mr. Brizzolara came down, and I told him that part of it had slipped my memory at that time, and I didn't tell it.

Q. Wasn't you asked if John Hicks did anything?

A. He asked me if John Hicks made any attempt to shoot, and I told him that he didn't.

Q. Wasn't I there at the examination before the commissioner?

A. I guess you were.

Q. Didn't I ask you what John Hicks did, and didn't you answer me, "He didn't do anything, only set on his horse?"

A. You asked me the question, I thought, whether he made any attempt to shoot or not.

Q. Didn't you answer this: "The defendant didn't do anything, only set there on his horse."

A. He didn't make any attempt at all, I said. I recollect of saying that he didn't make any attempt to shoow.

Q. You say that "He set there on the horse, and he had a gun
51 laying there on his lap, and every time Rowe would pull the gun up defendant would laugh, until Rowe shot." You told about his laughing.

A. Yes, sir.

Q. But you didn't tell this other. You didn't tell that he pulled his hat off and struck his horse across the neck with it, and said something that you understood to be, "die like a man." You forgot all about that when you were before the commissioner. Hasn't your memory been refreshed by Mr. Christian?

A. No, sir.

Q. Has it not been refreshed since you came here?

A. I was asked the question here if I heard that word, and I said that I did.

Q. Have you been talking with anyone about this case?

A. I talked with Mr. Clayton (the district attorney) a little about it.

Q. I mean outside of the attorneys. Haven't you been talking with Mr. Christian?

A. We have talked about it several times since.

Q. Now, you remember very distinctly you didn't testify that before the commissioner, and you remember you call' Commissioner Brizzolara's attention to it after you got down stairs?

A. Yes, sir; I did.

Q. That he pulled his hat off, struck his horse with it across the neck?

A. Yes, sir.

Q. How far was he from you when he did that?

A. He was 100 steps.

Q. When he said, "Die like a man," he spoke that in English, did he?

A. Yes, sir; he had an oath to it, too.

Q. You are about to tell us something else you have not told; let us have it all; all you know about it this time.

A. That is all I know about it.

52 Q. Are you sure that he laughed?

A. Yes, sir.

Q. You say that he laughed a dry laugh?

A. Yes, sir; didn't look like he was much tickled.

Q. You say that Colvard was between you and Hicks?

A. Yes, sir.

Q. How do you know it was not Colvard that laughed?

A. Because I was closer to Colvard than I was to Hicks.

Q. But very little. How close were they together?

A. They were about 3 or 4 steps, I reckon.

Q. And you were looking on, 100 yards away; how is it you can tell us it was not Colvard that laughed?

A. I know Colvard's laugh better than I did the other man.

Q. You had only knew him for two or three months?

A. I knew he was a man that laughed very loud when he did laugh.

Q. This was a loud laugh, was it not?

A. Not very; only just like I told you.

Q. Loud enough to hear it 100 yards?

A. Yes, sir.

Q. Did you hear Colvard say anything?

A. No, sir; I don't think I did. I heard him say something, of course——

Q. You heard nothing you could understand?

A. I saw Colvard motion his hand to him, and tell him he was a friend to both of them.

Q. Rowe was standing out in front of him, and Hicks was by his side, and he motioned his hand to whom?

A. To the man that was in front of him.

Q. Then he did not motion his hand to him, but to Rowe?

A. Yes, sir.

Q. How long have you lived in that country?

53 A. Well, I reckon it is about 15 or 16 months.

Q. Where did you come from?

A. I came from Kentucky.

Q. Did you come with Mr. Christian?

A. Well, the first time I came with Mr. Christian, and then I went back to Kentucky, and then I went back again.

Q. Mr. Christian came from Kentucky, too?

A. Yes, sir.

Redirect examination by the DISTRICT ATTORNEY:

B. F. Christian is the young man's name?

A. Yes, sir.

Q. You stated to Mr. Frederick, counsel for defendant, that the defendant used an oath when he said, "Die like a man." What was the oath?

A. He just said "Take off your hat, by God, and die like a man."

Q. He took his own hat off and struck his horse with it?

A. Yes, sir.

Recross-examination by Mr. FREDERICK:

Q. Is there anything else you know?

A. No, sir.

Q. That is the oath you speak about?

A. Yes, sir.

Q. You are sure that he said that?

A. Yes, sir; I am.

Q. You heard that distinctly?

A. Yes, sir; I did.

Redirect examination:

The DISTRICT ATTORNEY. You say when you were before the

54 commissioner you did not mention that; you testified to everything else.

A. No, I didn't mention that, about his hitting the horse across the head with his hat.

Q. You thought about that afterwards and spoke to Col. Brizollara?

A. Yes, sir.

Q. Do you know why you were not taken back and have it written down?

A. No, sir.

Q. Did he give you any reason?
A. No, sir.
Q. Did you mention the fact to him?
A. Yes, sir.
Q. That you had omitted to make that statement?
A. Yes, sir; and he told me that I ought to have made it when I was on the stand, and he said it didn't make any difference then, that I ought to have made the statement; and that was all.
Witness excused.

55 BEN F. CHRISTIAN, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. What is your name?
Answer. Ben F. Christian.
Q. You are a son of S. J. Christian?
A. Yes, sir.
Q. He is the gentleman who has already been upon the stand?
A. Yes, sir.
Q. Please state if you were at the dance at Jim Rowe's on the night of the 12th of February, 1892?
A. Yes, sir; I was there.
Q. What time did you get there?
A. I went there directly after dark.
Q. Did you know Mr. Colvard, the deceased?
A. Yes, sir; I knew him.
Q. Did you know the defendant?
A. I never knew him until that night.
Q. Did you know Stand Rowe?
A. No, sir; I never saw him until the night of the dance.
Q. You got there, you say, just after dark?
A. Yes, sir.
Q. How long did you stay?
A. I staid all night. I staid at the dance all night.
Q. Did you see Stand Rowe and the defendant there?
A. Yes, sir.
Q. Did they stay all night?
A. Yes, sir.
Q. Did you see the deceased there—Colvard?
A. Yes, sir.
Q. Please state if he staid all night?
A. Yes, sir; he staid all night.
56 Q. Was there any drinking going on there?
A. Yes, sir; Mr. Colvard was drinking.
Q. Did you observe whether there was anybody else drinking?
A. There was some more boys, Cherokee fellows, drinking; I don't know who they were.
Q. Did you have anything to drink that night?
No, sir.
Q. How drunk did the deceased get?
A. He got so drunk he could not walk. He was down drunk.

Q. What time of night was that, now?
A. That must have been about 11 o'clock, I reckon.
Q. When did he get up?
A. I could not say when he got up.
Q. About 11 o'clock he was down drunk?
A. Yes, sir.
Q. What time did you leave there?
A. I left there at daylight.
Q. Did anybody leave with you?
A. Yes, sir.
Q. Who?
A. Bob Murphy.
Q. Where did you go?
A. Went down to Mr. Murphy's house.
Q. Do you know whether the deceased and Stand Rowe and Colvard were still there when you left?
A. Yes, sir; I think they were.
Q. You went down to Murphy's, about 400 yards away?
A. Yes, sir.
Q. Now, then, go on and state what happened after you got down to Murphy's. Had they gotten up yet when you got down there at Mr. Murphy's?
A. Yes, sir; they were up.
Q. Had they had breakfast?
A. No, sir; breakfast was not quite ready when I got there.
Q. Now, then, you may state what occurred when you got there.
A. We hadn't been there long until Stand Rowe whooped off up the trail that led into the big road, and someone answered him, and I could not say who it was answered.
57 Q. What direction did the answer come from?
A. Come from towards Jim Rowe's hoouse.
Q. You heard the whoop upon the trail, and then you heard one down towards Jim Rowe's house. What did you see *them*?
A. I seen Mr. Hicks and Mr. Colvard——
Q. Who did you see, Hicks or Stand Rowe, first?
A. Stand Rowe first.
Q. You have not told about that.
A. He came right down the trail that led into the big road; he stopped, I reckon, about 10 feet of the big road, and the other two gentlemen they came on down.
Q. Who?
A. Mr. Hicks and Mr. Colvard come on down from Jim Rowe's house.
Q. In the road?
A. Yes, sir; right riding in the road.
Q. How were they riding?
A. Mr. Colvard was riding in a lope, tolerable fast, just ahead of Mr. Hicks.
Q. How was Hicks riding?
A. I think he was in a lope, too. Anyhow, Colvard was a little piece ahead of Hicks.
Q. Go on and state what was said and done.

A. Mr. Colvard run by Rowe a little peice, and Rowe hollered "Hup! Hup!" and Colvard turned his horse and came mighty near falling off the horse—he was still drunk—and Mr. Hicks came up and stopped his horse right by the side of Colvard's horse.

Q. Which way were the horses' heads pointing?

A. They were pointing north, I believe—Mr. Hicks' and Colvard's were.

Q. That is across the road?

A. No, off from the road.

Q. I say——

A. They had turned the horses out of the road.

Q. They had turned out and were facing north. The road runs
58 east and west?

A. Yes, sir; about so. They set there awhile and talked, and Mr. Rowe drawed his gun up to shoot Mr. Colvard——

Q. Pointed it towards him?

A. Yes, sir; then he laid it down in his lap, and drawed it up again.

Q. Did you see the defendant do anything at that time?

A. I heard the defendant laugh. He laughed a little and then a short time he shot.

Q. Who shot?

Stand Rowe.

Q. Did you see Hicks do anything?

A. No, sir; Mr. Hicks did not do anything, I don't think—that is, he never made any attempt to shoot.

Q. Did he do anything else?

A. No, sir; not that I seen.

Q. Did you hear him say anything?

A. No, sir; I did not. I never heard him say anything.

Q. Did you see him take off his hat?

A. Yes, sir; he took off his hat the second time, and hit his horse across his neck and he said to Colvard, "Take your hat off and die like a man."

Q. You heard him say that?

A. Yes, sir.

Q. When was that?

A. That was the second time after Rowe brought up his gun the second time to shoot.

Q. How long after that until Rowe shot?

A. It was not but just a little while until he brought his gun up again?

Q. When he fired his gun, if he fired it; go on from there.

A. After Rowe fired his gun Colvard's horse wheeled, and just as his horse wheeled Rowe shot again, and then Mr. Hicks and Rowe——

Q. Then what became of Colvard?

A. Colvard's horse ran, I reckon, about 100 yards, I reckon, or a little over, and Colvard fell off on the right side of his horse.

59 Q. What became of Hicks and Stand Rowe?

A. They turned off and went up above Murphy's house; went up by a mountain or hill, and that is the last I saw of them.

Q. The two went off together?

A. Yes, sir.

Q. You say that when Hicks took his hat off he spoke to Colvard?

A. Yes, sir.

Q. Use his exact language, if you please.

A. He took his hat and hit his horse on the neck, and said, "Take your hat off and die like a man." Just struck his horse on the neck that way.

Q. When Colvard's horse ran, which way did it go?

A. Right towards Jim Rowe's house. Whirled around and took up the big road.

Q. Did you examine the body?

A. No, sir; I didn't.

Q. So you don't know where he was shot?

A. I said I didn't examine the body, I helped put him in the wagon, up at Jim Rowe's house.

Q. Did you see how he was shot?

A. I seen the bullet hole here in his overcoat. They didn't take his overcoat off then, and I don't think they took it off until they got home. Mr. Murphy took him over home, about 8 miles from there, to the Saline Court-House.

Q. Did he live at Saline Court-House?

A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

You were not a witness before the commissioner, were you?

A. No, sir.

Q. You say that Colvard got down, drunk, about 11 o'clock?

60 A. Yes, sir; well, I could not swear it was 11 o'clock, but somewheres along there.

Q. Did he bring the whiskey there with him?

A. I could not say, for I didn't see him get any whiskey.

Q. Did you see him drink any at all?

A. No, sir; I did not.

Q. Who was Colvard with?

A. He wasn't, to say, with any particular one. He was around there, and there was a whole crowd of them there.

Q. Did you see him talking with Stand Rowe?

A. No, sir.

Q. Did you say you saw him with Stand Rowe?

A. No, sir.

Q. Did you hear him talking with Stand Rowe?

A. No, sir.

Q. Did you hear him talking with John Hicks?

A. No, sir; I don't believe I did.

Q. Did you see them together?

A. I seen them together; yes, sir.

Q. But you didn't see them together, particularly; they were just in the crowd together?

A. Yes, sir.

Q. You didn't see them them off together alone?

A. No, sir.

Q. No time while you were there?

A. I was in the house, and I won't say they were not together.

Q. I just asked you if you saw them together?

A. No, sir.

Q. You didn't see them, only in a crowd, generally?
A. No, sir.
Q. You never saw them talking together?
A. No, sir.
Q. That is, you never saw Stand Rowe talk with Colvard, or Colvard talk with Stand Rowe, or with this defendant?
A. No, sir.
Q. Did you see this defendant talk any at all that night?
A. Yes, sir; I heard him talking to some of them fellows, but I could not understand his language.
61 Q. Talked to those Cherokees?
A. Yes, sir.
Q. Did you hear Jack Colvard talk Cherokee, too?
A. Yes, sir.
Q. It was a Cherokee crowd, generally, wasn't it?
A. Yes, sir; it was a Cherokee crowd.
Q. Most of the talk there was in Cherokee?
A. Yes, sir.
Q. You didn't understand it, of course?
A. No, sir.
Q. You think you left them all here—that is, you left Colvard, Hicks, and Stand Rowe there when you left?
A. Yes, sir.
Q. And you left there about what time?
A. I left there after daylight.
Q. It was hardly sunup yet, was it?
A. No, sir; not when we left.
Q. Do you think it was sunup when you got home?
A. It was mighty near to it, but not quite.
Q. You and Robert Murphy went home together?
A. Yes, sir.
Q. You came on home, and your folks, or Mr. Murphy's folks, were up?
A. Yes, sir.
Q. You and Robert went along and washed your faces?
A. Yes, sir.
Q. How long after you had gotten home until you saw Stand Rowe?
A. It was about half an hour or three quarters, I reckon.
Q. Who first called your attention to Stand Rowe being out there?
A. Stand Rowe himself. He whooped.
Q. Didn't Mr. Murphy call your attention to it, and say, "Boys, there comes that desperado we saw last night?"
A. He did that after I was down on the porch. I had done seen Stand Rowe.
Q. Were you not standing around the fire, you and Robert Murphy and your father standing around the fire, while Mr. Murphy walked
62 out on the porch; wasn't it from the porch that Mr. Murphy said, "Boys, here is that desperado that we saw last night?"
A. No, sir; Mr. Murphy stepped out on the porch first. He hollered more than once, I think. And pa was the next one stepped out, and I think I was the next. We were all on the porch, anyhow, and Stand Rowe came to this place and stopped.

Q. You didn't see him until you went out on the porch?
A. No, sir.
Q. You saw him as soon as you went out on the porch?
A. Yes, sir; I seen him directly after he had hollered. We were all out there, you might say, at the same time, just as fa't as we could rush out of the door.
Q. You deny that Mr. Murphy called your attention to his coming?
A. Yes, sir; I don't think he did.
Q. How long did he stand down there on his horse before these other people came along?
A. About 5 or 10 minutes, I should think.
Q. How far away were Hicks and Colvard when you first saw them; how far from Mr. Murphy's, where you were standing on the porch?
A. I suppose about 250 yards.
Q. 50 yards from where you were standing, on the porch, to where Jack Colvard and Hicks were?
A. Yes, sir; to where I first saw them coming down.
Q. How far away was Stand Rowe?
A. I declare I could not tell you; he wasn't over 100 yards, I don't think.
Q. Wasn't Colvard and Hicks further away than Rowe?
A. Yes, sir; when I first saw them they were.
Q. Well, then, how far was it away from where you were standing, on the porch, to where you first saw Hicks and Jack Colvard?
A. I expect about 250 yards.
63 Q. I misunderstood you, then; I thought you said about 50 yards; that is about halfway or more up to Jim Rowe's house?
A. Yes, sir.
Q. Did you see anybody else come along the road?
A. No, sir.
Q. When you first saw them how were they riding—walking along, or how?
A. No, sir; they were in a lope.
Q. Both of them?
A. I think they were; both of them.
Q. You think Jack Colvard was ahead?
A. Yes, sir; he was ahead of Hicks when he came down to where Rowe was.
Q. Didn't Hicks ride up in a walk to where Rowe was?
A. I don't think he did.
Q. Wasn't they about 60 yards away from where Rowe was standing on his horse when Jack Colvard galloped his horse away from John Hicks and went up to where Rowe was?
A. He might have been that far; anyhow I know that Colvard beat Hicks there.
Q. Right smart little time?
A. Not so powerful long.
Q. Didn't Hicks ride along in a slow walk after Colvard left him?
A. I don't think he did.
Q. You saw them?

A. Yes, sir; as well as I remember I don't think Mr. Hicks's horse was in a walk.

Q. Is your memory clear about the transactions there that morning?

A. Yes, sir.

Q. You think Hicks rode in a gallop, too?

A. Yes, sir; I think so.

Q. You heard Hicks say, "Pull off your hat and die like a man?"

A. Yes, sir.

Q. Is that all he said?

A. It is all I heard said.

Q. Did he say that in English?

64 A. Yes, sir; he spoke that in English.

Q. Did you understand any other words that were used there that morning?

A. No, sir.

Q. These are the only words you understood?

A. That is all.

Q. You did not tell us that until the district attorney asked you specially about it; how does that happen?

A. Tell you which?

Q. You didn't tell us about his pulling his hat off his head and saying for him to die like a man?

A. I had forgotten that, I reckon.

Q. How does it come you all forget that part of it?

A. I could not tell you.

Q. You forgot that; haven't you heard that since you came here?

A. No, sir; I heard that myself right there that morning.

Q. You forget about it when you get on the stand?

A. I guess I would have got to it after awhile, maybe.

Q. Wasn't that part of it as much of the occurrence as the laughing part? You told the district attorney that John Hicks would laugh; he didn't have to ask you about that, but you could not recollect about his pulling his hat off and saying for him to pull his hat off and die like a man until you were asked specially about that?

A. No, sir.

Q. Haven't you talked about that?

A. Not since we have been here.

Q. Haven't you talked with Mr. Murphy and Robert Murphy about it?

A. We never talked much about it.

Q. Didn't you get together frequently and talk about what this one

65 said and what that one said and how the whole thing occurred, and what was said by everyone?

A. I don't remember whether we did or not; I have not been with Mr. Murphy and Bob much since.

Q. You were along shortly after that?

A. Yes, sir; shortly after that I was.

Q. You were not much acquainted with Jack Colvard, were you?

A. Yes, sir; I was tolerably acquainted with him.

Q. You don't know whether he was an Indian or not?

A. No, sir; I could not say.

Q. You know of him talking Cherokee?
Q. Yes, sir; I know he talked Cherokee.
Q. Were you ever at his store?
Q. Yes, sir; I have been down there.
Q. Did you buy goods from him?
A. No, sir; I never bought anything from him.
Q. Did you see him there?
A. Yes, sir; I have seen him there.
Q. Whose store was it?
A. I suppose it must have been his'n.
Q. They called it his?
A. Yes, sir; it always went by the name of Colvard's store.
(Witness excused.)

66 ROBERT MURPHY, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. State your name, please.
Answer. Bob Murphy.
Q. Robert?
A. Yes, sir.
Q. Are you a son of William J. Murphy?
A. Yes, sir.
Q. Do you live with him?
A. Yes, sir.
Q. Were you at the dance at Jim Rowe's on the night of Feb. 12th, 1892?
A. Yes, sir.
Q. Did you stay all night?
A. Yes, sir.
Q. State if you saw the defendant there.
A. Yes, sir; I seen him there.
Q. Did you see Stand Rowe?
A. Yes, sir.
Q. Were they armed?
A. Yes, sir; I believe they were.
Q. What did they have?
A. They had Winchesters.
Q. Was there anybody else there had Winchesters except these two men?
'. I didn't see anybody else.
Q. Did you see A. J. Colvard there?
A. Yes, sir.
Q. I believe you say you staid all night.
A. Yes, sir.
Q. Did you see these three men together at any time?
A. Yes, sir.
Q. What time did you leave the dance?
A. I left about daylight.
Q. Who left with you?
A. Benn Christian.

Q. Where did you go?
A. I went up to my father's.
Q. Did you leave these three men at the dance?
A. Yes, sir; I think we did.
67 Q. What time did you get to your father's?
A. Well, I got ther'—it didn't take me more than 20 minutes——
A. I say about what time did you get there; was it sunrise yet?
A. The sun was rising when we got there.
Q. State what occurred after you got there—got home?
A. I was at home about 20 minutes, I reckon, fifteen or twenty minutes, when this Rowe came riding down the road there, whooped just before he got to the road.
Q. Did he come riding down the road or trail?
A. He came riding down the trail to the road.
Q. Go ahead.
A. He stood there awhile, and directly Jack Colvard and Mr. Hicks came riding, and Mr. Colvard was 30 yards ahead of Mr. Hicks.
Q. Where did they come?
A. They came from Jim Rowe's house, up the big road towards our house.
Q. When they came, where was Stand Rowe?
A. He was standing on *on* the outside of the road there, close to the trail.
Q. Standing?
A. Yes, sir.
Q. What was he standing on?
A. Standing on his horse.
Q. Standing on his horse or sitting on his horse?
A. He was setting on his horse.
Q. How far from the road?
A. I reckon 6 or 8 feet from the main road.
Q. Colvard came on ahead, you say.
A. Yes sir.
Q. Tell everything that occurred.
A. Colvard came on ahead of Mr. Hicks; he was loping his horse tolerable pert, and he came pretty near going by Mr. Rowe, and Mr. Rowe said, "Hup! hup! hup!" just about that way, and Jack's
68 horse turned, and he came very near falling off of his horse when it turned.
Q. Do you know whether he had been drinking or not, Jack Colvard?
A. Yes, sir: I think he had been drinking. He was drunk there that night at the dance. He came riding up and turned his horse, and Mr. Hicks came riding up and stopped his horse right close to Jack, and they commenced talking, all of them.
Q. State everything that was said and done there that you heard.
A. They commenced talking there, and Jack said he was a friend to both of them.
Q. That was Colvard?
A. Yes, sir; and Mr. Rowe pulled up his gun, pointed it at Jack, and laid it down in his lap, and Mr. Hicks he would laugh, and he pulled it

up the second time and pointed it at Jack, and Mr. Hicks laughed the second time, and he hit his horse's neck with his hat and said to Jack to take off his hat and die like a man.

Q. What was done then?

A. The third time he pulled the gun up he shoot him.

Q. Who did?

A. Mr. Rowe.

Q. Pulled up the gun the third time and fired?

A. Yes, sir.

Q. What became of Colvard?

A. Jack's horse started, wheeled, and started back towards Jim Rowe's house, and I never stepped the distance, but he run about 115 or 116 steps, somewhere along there, when Jack fell off, and he fell on the right side of his horse.

Q. What became of Stand Rowe and the defendant Hicks?

A. They stood there until Jack fell off, and then they rode up the hill.

Q. Went off together?

A. Yes, sir.

Q. Do you know whether your father stepped that distance that the horse ran with Colvard?

A. I think he did.

69 Q. Do you remember how far it was?

A. I don't recollect; I think he said it was 114 or 115 steps. I never stepped it myself.

Q. Did you go up to where the deceased was?

A. No, sir.

Q. Did you see him afterwards?

A. Yes, sir; I seen him after he was carried to Jim Rowe's.

Q. Where was he shot?

A. Right about here.

Q. To the left of the center of the breast, about on a line with the nipples?

A. Yes, sir.

Q. Was he shot anywhere else?

A. I just seen where his clothes were glanced with the second shot h're.

Q. What position was Jack, as you call him, or Mr. Colvard in when the second shot was fired?

A. It looked like to me he threw himself forward in his saddle; just clinched his horse with his legs; had his hand up this way.

Q. Was he armed?

A. No, sir; I think not. I didn't see any pistol on him.

Q. The only thing you heard him say was, "I am a friend to both of you?"

A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

Did you hear them talking any together there that night at the dance?

A. Yes, sir.

Q. You heard Jack Colvard talking, did you?

A. Yes, sir.

Q. What sort of language was he using?

A. He was talking English.
Q. Who was he talking to?
A. Talking to Mr. Hicks and Mr. Rowe both.
70 Q. And talking English?
A. Yes, sir.
Q. Did they talk English back to him?
A. Yes, sir.
Q. Rowe talked English back?
A. Yes, sir.
Q. Stand Rowe?
A. Yes, sir.
Q. Did you hear him talk any Cherokee to anybody?
A. Yes, sir.
Q. Who was it he talked Cherokee to, you?
A. No, sir.
Q. Who was he talking to?
A. To Jack and several fellows around there; I could not understand Cherokee myself.
Q. I am talking about Jack Colvard; who was he talking to?
A. He was talking to Mr. Hicks.
Q. Talking English to Mr. Hicks?
A. Yes, sir.
Q. What was he saying to Mr. Hicks?
A. I never paid any attention.
Q. You paid enough attention to know they were talking English?
A. Yes, sir.
Q. Did Hicks talk back to him?
A. Yes, sir.
Q. What language?
A. Cherokee.
Q. Did Colvard talk back in Cherokee?
A. Sometimes he would, and sometimes he would answer him in English.
Q. Did you see Colvard talking with Stand Rowe?
A. Yes, sir.
Q. In English?
A. Yes, sir; he was talking to him in English part of the time.
Q. And Stand Rowe talked English back to him?
A. No, sir.
Q. Talked Cherokee?
A. Yes, sir.
Q. You don't know what they were saying?
A. I heard Jack ask Rowe to go home with him.
Q. Jack Colvard asked Rowe to go home with him?
A. Yes, sir.
Q. What time in the night?
A. I guess it was about midnight.
Q. It was about the time that Colvard was lying down drunk,
71 wasn't it?
A. No, sir.
Q. What time did he get down drunk?

A. About an hour, I reckon, after he got there.
Q. He got drunk about 11 o'clock, did he not?
A. No, sir; I think not.
Q. Your name is Robert Murphy?
A. Yes, sir.
Q. You were there with Ben Christian?
A. Yes, sir.
Q. When was it that he got down drunk; about what hour of the night did he get down drunk?
A. I suppose about 8 o'clock.
Q. He didn't get there until 8 o'clock, did he—Jack Colvard?
A. I don't know; I don't know what time he came; it was early, though.
Q. Did he come before your father left?
A. He came just as my father was leaving.
Q. What time did your father go away?
A. I don't know what time.
Q. Your father went there about dar', did he not?
A. I could not say; I reckon it was.
Q. He staid a couple of hours, did he not?
A. I don't know how long he staid.
Q. Your best recollection is that Colvard got down drunk about 8 o'clock?
A. Yes, sir; b'*wt*een 8 and 9; somewhere along there.
Q. How long was he down?
A. About an hour and a half, I guess.
Q. Then he got up and went and talked to Stand Rowe, did he?
A. He didn't get right straight up and went and talk to him. He got up and danced a set or two.
72 Q. They all seemed very friendly, didn't they?
A. Yes, sir.
Q. You could not understand what Stand Rowe was talking about to him?
A. No, sir.
Q. You could not understand what John Hicks said?
A. No, sir.
Q. Because you didn't understand Cherokee?
A. No, sir.
Q. You think you left Stand Rowe and John Hicks and Colvard all at the dance when you left that morning?
A. Yes, sir; I think they were.
Q. After you had been at home about 15 or 20 minutes you saw Stand Rowe riding down the trail?
A. Yes, sir.
Q. How long did he stand there before Colvard and Hicks came up to him?
A. Not but a little while.
Q. Quarter of an hour?
A. No, sir; not over ten minutes.
Q. What was he doing here, standing there ten minutes?
A. I don't know what he was doing.

Q. Wasn't holloing any?
A. No, sir; he never whooped but one time that I heard.
Q. You didn't hear him whoop at all, did you?
A. Yes, sir.
Q. How many times?
A. Once.
Q. That was before you saw him, was it not?
A. Just as I stepped out of the door.
Q. That is what called your attention, was it not?
A. Yes, sir.
Q. He stood down at the road about 10 minutes, and then you saw Colvard and Hicks come?
A. Yes, sir.
Q. Did Colvard and Hicks come up together?
A. No, sir.
Q. Colvard came in a run on his horse, did he not?
A. Mr. Colvard was coming tolerably fast on his horse.
73 Q. Coming in a gallop?
A. Yes, sir.
Q. John Hicks was coming along slowly?
A. I think he loped up after Jack.
Q. Do you think so?
A. Yes, sir.
Q. What did Colvard say to Stand Rowe when he rode up to him? You say Stand Rowe went "Hup! Hup!"
A. I didn't understand anything Jack said, only he told him that he was a friend to both of them.
Q. When he first rode up?
A. No, sir; when they all first got there together they were talking something, but I could not hear it; I could not hear anything, only I heard Jack say, "I am a friend to both of you."
Q. Those are the only words you understood him to say, that you understood Jack to say?
A. Yes, sir.
Q. And you didn't understand any words that Rowe said?
A. No, sir; I didn't.
Q. What words did you understand Hicks to say?
A. He just pulled off his hat and slapped his horse on the neck with it, or his leg, and told Jack to take off his hat and die like a man.
Q. You could hear that plain?
A. Yes, sir; he spoke that loud.
Q. That is all you could understand that he said?
A. Yes, sir.
Q. He said that in English, too?
A. Yes, sir.
Q. Did you testify before Col. Brizzolara, the commissioner?
A. Yes, sir.
Q. Did you testify before him that John Hicks pulled off his hat and struck his horse, and said, "Pull off your hat and die like a man?"
A. No, sir; I don't believe I did.
Q. Why didn't you tell it there?

A. It wasn't in my memory.

74 Q. You forgot that too; how does it happen you all forget that; you told about Hicks laughing, didn't you, before the commissioner?

A. Yes, sir.

Q. You stated there that every time that Stand Rowe would put up his gun Hicks would laugh?

A. Yes, sir.

Q. But you didn't tell anything about him pulling off his hat—about his telling Colvard to pull off his hat and die like a man; hasn't your memory been refreshed about that since you came here?

A. No, sir; it has not.

Q. Haven't you been talking with Mr. Christian?

A. No, sir.

Q. Didn't you talk to Mr. Christian before you came here about it; about what was said there that morning?

A. No, sir; I didn't.

Q. Didn't you talk with your father?

A. No, sir.

Q. Didn't you talk with Ben Christian?

A. No, sir.

Q. You didn't talk with anybody about the facts in the case?

A. No, sir.

Q. Not until you came here?

A. No, sir.

Q. About what was done and said there that morning?

A. No, sir.

Q. You never talked with anybody about it?

A. Not that I know of, I haven't.

Q. You know it, don't you?

(No response.)

Q. Hasn't your attention been called to that fact as to what John Hicks said when he pulled his hat since dinner?

A. No, sir.

Q. Haven't some of the witnesses been telling you about that, that you are not to forget it when you got on the stand?

A. No, sir; I didn't have to be told that; I heard him say it.

Q. Why didn't you think of it before the commissioner?

75 A. I just didn't think about it.

Q. Did you testify before the commissioner that John Hicks pulled off his hat and struck his horse and said, "Pull off your hat and die like a man;" did you testify to that before the commissioner?

A. No, sir.

Q. Why?

A. I could not think of it.

Q. Why couldn't you think of it then?

A. I don't know why.

Q. Were you not asked there to tell what was done and said by Col. Brizzolara and by myself; wasn't you asked by us to tell what was said and done there?

A. Yes, sir.

Q. And you told about his laughing?
A. Yes, sir.
Q. Told about the shooting?
A. Yes, sir.
Q. Told about his raising his gun there three times, and told about Colvard saying, "I am a friend to both of you?"
A. Yes, sir.
Q. You told everything that you have told here, except you didn't tell about Mr. John Hicks taking of his hat and slapping his horse, and saying, "Die like a man;" you tell us now you forgot it then?
A. I just didn't think of it when I was testifying.
Q. You didn't think of it?
A. No, sir.
Q. And you have never talked with anybody since about it?
A. No, sir.
Q. Nobody has ever talked in your presence about it; about what John Hicks said there?
A. No, sir.
Q. You have never talked with anybody about it?
A. No, sir.
Q. And you forgot of it before the commissioner and think of it now; you are not an Indian, are you?
A. I am an adopted citizen.
Q. By marriage?
A. Yes, sir.

76 Q. You have married since you went there, in the last fifteen months?

A. Yes, sir.
Q. When were you married?
A. Christmas day.
Q. Who did you marry?
A. Sallie Williams.
Q. Is she any kin to Jack Colvard?
A. I don't know whether she is or not.
Q. Is she any kin to Jack's children?
A. I don't know whether she is or not.
Q. You don't know your wife's kin folks?
A. No, sir.
Q. Haven't you made any inquiry about them; is she any kin to Mr. Ingram or Mr. Whittaker?
A. No, sir; I don't think she is.
(Witness excused.)

77 WILLIAM BATT, having been duly sworn upon behalf of the Government, and not being able to speak the English language, was examined by the district attorney, Mr. W. H. H. Clayton, through an interpreter, and testified as follows, to wit:

Question. Ask him what is his name.
Answer. William Batt.
Q. Where does he live?
A. He says he lives in Saline district, Cherokee Nation.

Q. Ask him if he knows the defendant, John Hicks.
A. Yes, sir.
Q. Ask him how far he lives from Jim Rowe's.
A. He says, I live a little over two miles.
Q. In what direction from Jim Rowe's?
A. A little east of Jim Rowe's, where he lives.
Q. Ask him if he was at Jim Rowe's at a dance on the night before the killing of Colvard.
A. Yes, sir; he was there.
Q. Did he see the defendant there?
A. Yes, sir.
Q. Did he see Stand Rowe there?
A. Yes, sir.
Q. Ask him if they were armed, these two men.
A. They were armed; yes, sir.
Q. How were they armed?
A. They had Winchesters.
A. Did both of them have Winchesters?
A. Yes, sir.
Q. Did he see anybody else there except these two men with Winchesters?
A. No, sir; not as to Winchesters.
Q. Does he know why they were then carrying Winchesters?
A. No, sir; he says he could not say; but then Stand Rowe was an outlaw at the time, and he though' that it was perhaps for his own protection.
78 Q. Did he say that Stand Rowe was an outlaw or scout?
A. Scout is what he said.
Q. Does he know why the defendant was carrying a Winchester?
A. No, sir; he says he don't know.
Q. Does he know what time the defendant got there to that dance?
A. Yes, sir; he knows when he came there; it must have been about 9 o'clock.
Q. Did they come together?
A. Yes, sir.
Q. Horseback or on foot?
A. Horseback.
Q. They came together on horseback?
A. Yes, sir.
Q. Does he know where Stand Rowe lived?
A. No, sir.
Q. Does he know where Hicks lived?
A. No, sir.
Q. But he saw them come there together?
A. Yes, sir.
Q. Now, then, ask him if he saw Andrew J. Colvard there; if he saw him come there—the man who was killed.
A. No, sir; he did not.
Q. Does he know who was there first, whether it was Colvard or the defendant?

A. He says he was in another room from where they were dancing, and after some time that he had been there he heard Jack Colvard talking in the other room, and he recognized his voice.

Q. Ask him if he remained all night that night.

A. Yes, sir.

Q. Did these men stay there—Stand Rowe, the defendant, and Colvard—did they remain all night?

A. Yes, sir.

Q. Ask him if he saw th'm in the morning just before they left or at the time they left.

A. Yes, sir; he saw them.

Q. Now, then, did he see them leave there at first?

A. Yes, sir.

Q. Which way did they go, and did they all go together? When
79 they first left did they all go together, and which way did they go when they first went?

A. They went west.

Q. Did they go west when they first left?

A. Yes, sir; he says he overtaken them; he found them all standing there somewhere——

Q. I know he found them standing there somewhere; now, that somewhere is just the place I want to find. Ask him if he knows where Mr. Murphy lives there.

A. Yes, sir.

Q. Was it towards Murphy's or in an opposite direction from Jim Rowe's?

A. He says they only went about 60 yards in the direction of Murphy's house, and then they turned back and came back to Rowe's.

Q. They started off all three together, didn't they?

A. Yes, sir.

Q. And went about 60 yards in the direction of Murphy's house and then turned; and then where did they go?

A. He says they passed right by the place where they had the dance and went towards the east.

Q. How far east did they go?

A. He says they went between 160 and 200 yards east.

Q. They left Rowe's; ask him if there was anybody except these three men.

A. He said there was several more; he says when they passed by returning from Murphy's or that direction, going east, he went with them.

Q. He told you who was along, didn't he?

A. He said that Jim Rowe was along, and Eli Batt, and John Goose.

Q. Ask him if a man named Mixwater was along.

A. He was riding behind Jack Colvard.

Q. On whose horse?

A. On Jack Colvard's horse.

Q. What became of Mixwater's horse?

80 A. It got loose that night, he said.

Q. He was riding behind Colvard?

A. Yes, sir.

Q. I understand, then, that the crowd including Stand Rowe, and the defendant, and Colvard, and Mixwater, and Eli Batt, and Jim Rowe, and some others, John Goose among them, started down towards Murphy's, and they went about 60 yards and then turned around and came back by the house going east, opposite direction, for 150 or 160 yards or so, down east. Now, then, ask him if he knows where the road is that leads from this main road that goes by Jim Rowe's house over to Saline court-house, where Colvard lives.

A. Yes, sir; he knows where Rowe lives.

Q. When they stopped, how far did they stop from where that road turns off to the main road—the road that Colvard would take to go home?

A. He says it must have been about 100 yards from the road.

Q Did they pass by the forks of the road, or had they got quite to it?

A. They hadn't got to it quite, when they stopped.

Q. When they stopped what did they do, and what did the crowd go down there for?

A. He says while they were all standing there a good many began to leave——

Q. Ask him if they took any drink while they were there?

A. Yes, sir.

Q. They took a drink?

A. Yes, sir.

Q. What did they go down to that place and stop for?

A. He says that Jack Colvard was telling Stand Rowe if he would go home with him he would give him a suit of clothes, and a hat, and some shoes.

Q. Ask him the question why that bunch of men went there. He has already said they took a drink; if that is the reason, I want to
81 know what he went there for and what the rest of them went there for, if he knows.

A. He says he reckons it is because they were all drinking. He says Jack Colvard was very drunk. He says that is about the only thing.

Q. Now, what did he say about asking Stand Rowe to go home with You say that he said he asked him to go home with him, and he would give him a suit of clothes, a pair of boots, and what?

A. And a hat.

Q. Tell him to go on.

A. Well, he says that Stand Rowe did not want to go, and his brother Jim told him to go along with him, and they could leave him somewhere.

Q. Go ahead.

A. He says after they had gone about the length of this room——

Q. Who had?

A. Jack Colvard and Stand Rowe.

Q. Was Mixwater along?

A. He was riding behind Jack Colvard.

Q. On the horse; and then three of them went together?

A. Yes, sir.

Q. Went about the length of this room, and then what?

A. They turned their horses then and loped——

Q. Who did?

A. Colvard and Stand Rowe. He says they turned their horses and then began to lope their horses and went out of sight.

Q. I do not think you got that right. I think you have got that mixed.

A. No; that is what he said.

Q. Try him again?

A. He says there was three men besides this one that was riding behind Jack Colvard.

Q. Who were they?

A. I can't give the name of this other man.

Q. Was it John Hicks?

A. Yes, sir; I could not get the name.

82 Q. That is a pretty important name. John Hicks, Stand Rowe, and who else?

A. And Mixwater, and Colvard.

Q. That is four?

A. Yes, sir.

Q. They started off in what direction from that corwd?

A. They went in an easterly direction.

Q. Right back again? I want to know in what direction these four men left in when they left, when they went from the crowd where they were drinking. Ask him whetheror not they went up the road leading towards where Colvard lived?

Mr. FREDERICK (of counsel for defendant). Ask him what direction? That is the correct question.

The DISTRICT ATTORNEY. Tell him to go ahead and answer my question.

A. No, sir; he says it was not in the direction of Jack Colvards' house. He says it was in that direction; he can't think whether it was west or not.

Q. West is right back towards Colvard's house; tell him.

A. Yes, sir; he says west now.

Q. West is towards Murphy's house, is it not?

A. Yes, sir.

Q. Did they all start to go back towards Jim Rowe's house?

A. No, sir.

Q. Tell him if they went went west they did. He has said Jim Rowe's house is west. [Witness is here shown diagram.] He says that crowd left here and went down towards Murphy's about 60 yards; is that right?

A. He says when they started out towards Murphy's house they came out here.

Q. He says when they started out towards Murphy's house they came out this far where the big road and trail meets; when they first started out they started west 60 yards?

A. Yes, sir.

83 Q. Then they came back this way and stopped [indicating on diagram]?

A. Yes, sir.

Q. And took a drink?

A. Yes, sir.

Q. Then after they took a drink did anybody leave that crowd; did Stand Rowe and Colvard leave together and go up this rode at all?

A. Yes, sir; he says all of them started together, and they went about here somewhere, and then they turned up in that direction [indicating on diagram].

Q. How far out that way did they go?

A. They went out of sight; he didn't see them any more.

Q. Tell him that is north then; they must have gone north?

A. No, sir; he says it is west.

Q. Tell him this is west back here where Murphy lives. He has said 100 times that Murphy lives west.

A. He says west is in this direction, and Murphy's house is in this direction.

Q. Southwest?

A. Yes, sir.

Q. Then they turned up and went up in this direction?

A. Yes, sir.

Q. This is the direction they went?

A. Yes, sir.

Q. He says they went here out of sight. That is north on this map as we have it. [Witness points on diagram the way the parties went.]

Q. Now, did he see anything more of Colvard after that?

A. Yes, sir.

Q. Where did he see him?

A. He came back to where he was standing there.

Q. Was Mixwater with him?

A. Yes, sir; he was still behind him.

Q. He came back from the place by himself, him and Mixwater,
84 on the same horse?

A. Yes, sir.

Q. What became of Stand Rowe and the defendant Hicks?

A. He says he don't know what became of them.

Q. Did he see them any more?

A. No, sir.

Q. But the man who is now dead came back to where this crowd had been, where he was?

A. Yes, sir; he came back.

Q. Now, when Colvard and Mixwater came back to where he was, what became of him then?

A. He says while him and Jim Rowe and Eli Batt was standing there Jack Colvard and Mixwater came back, and he says they advised him to go back home.

Q. Who advised him?

A. He says he himself told him that.

Q. Told Colvard that?

A. Yes, sir.

Q. Then what?

A. They all joined in and told him that he says——

Q. Tell him to go ahead.

A. He said he didn't want to go home, and I begged him to, and he said he didn't want to go home at all, and he wanted to go in the direc-

tion that these other men had gone, and I told him it would be better for him to go back home, to go to his home. He says when he did agree to go he went with him off about 50 yards.

Q. In what direction?

A. Down the road.

Q. Towards his home?

A. Yes, sir. And he says he told him he would be down at the store in the morning. He says when he turned back from this trip he had started with him——

Q. Who turned back?

A. The witness; he says he started to go with Colvard towards his home, and he turned back to go towards the house, and just a little before he got to the house he looked back and he saw Mixwater get down.

85 Q. Get off the horse?

A. Yes, sir; and he says as soon as Mixwater got off his horse Jack Colvard then loped towards the house, and caught up with us before we got to the yard fence.

Q. Came back in a lope to Jim Rowe's house?

A. Yes, sir; just before we got to the house.

Q. Overtook them?

A. Yes, sir.

Q. Tell him to go ahead?

A. He says when they got to the yard fence Jim Rowe said, "Let's go in and warm," and Colvard said, "What will I do," and Jim Rowe told him to get down and come in and warm, and then we were there and those that were walking went around to the house, and when they got even with the house they stopped, and he rode around then to the steps, Jack Colvard did. He says there is a smokehouse standing a little distance from the other house where Jim lives, and they got behind that smokehouse, and he didn't see him any more.

Q. Who did?

A. Him, and Jim Rowe, and the witness; and he said he didn't see Colvard then.

Q. He left Colvard on the horse?

A. Yes, sir.

Q. Did he see Colvard any more?

A. No, sir.

Q. Now, then, he says he didn't see Colvard any more?

A. No, sir.

Q. Where was he when Colvard left there?

A. The last time he saw him he went around and come around to the steps, and he just thought that he had gone around to get down, he says.

Q. He didn't see him when he left th'n, did he?

A. No, sir; that is the last time he saw him.

Q. Nor does he know how Colvard and Hicks got together again?

A. No, sir; he don't know; he didn't see them any more.

Q. Now, then, how long was that before the killing that he last
86 saw Colvard at the house on the horse; ask him if he heard the guns fire?

A. He says he could not say.

Q. How long was it before he heard of the killing that he saw the deceased last?

A. He says while they were standing there, all of them, talking he saw a young man come in sight——

Q. Who was the young man?

A. Switch Foreman; and when he got near enough to him he called him by his name, and told him that Jack Colvard been killed, and he reckoned his horse had throwed him. He says he was lying in the road out here, and I guess the horse must have thrown him; I believe it has killed him.

Q. Then did he go down?

A. Yes, sir; he says he went in a run.

Q. Was there anybody with him?

A. Yes, sir; a good many, he thinks.

Q. Went in a run?

A. Yes, sir.

Q. How far did they go; how far did they go before they found the deceased?

A. He says he supposes it must have been about 200 yards.

Q. What did he find?

A. He found Jack Colvard lying there.

Q. Lying where?

A. In the road, alongside of the road.

Q. Alive or dead?

A. He was breathing a little; his breast was going up and down, after he got there. They took him up not very long after and took him to the house, and when they got him to the house he was dead; he says he reckons he must have died when they were carrying him.

Q. Was there any wounds on him?

A. Yes, sir; a bullet hole in his breast here.

Q. Was there any other shots about him?

A. Yes, sir; a bullet hole through his clothes here.

Q. They took him to the house and he was dead?

87 A. Yes, sir; he says they just laid him inside of the yard.

Q. Now, then, as I understand this witness, the last he saw of Stand Rowe and Hicks was when they were going up west, as he calls it, with Colvard and Mixwater; he saw them go up a hill just before he saw Colvard and Mixwater come back, and that is the last he saw of them, is it?

A. Yes, sir; that is the last time.

Q. Now, then, how far were they from the road in which he was standing when he saw them last going across, about how far were they from him, where he and the crowd were standing in the road before that?

A. About 300 yards, he guesses.

Q. That is all the further he could see them?

A. Yes, sir.

Q. When those four men left to go up there, did they all ride together, or how was that?

A. Yes, sir; they all went off together.

Q. Who rode in the middle?

A. He says he could not say as to who rode in the middle.

Q. Did the defendant, Hicks, and Stand Rowe have their guns with them at that time?

A. Yes, sir.

Q. Did Mixwater and Colvard have any guns with them?

A. I did not see any.

Q. Now, there was three horses and four men—Mixwater and Colvard on one horse and Stand Rowe on another, and the defendant on another?

A. Yes, sir.

Q. Did he hear anything said between these four men when they started off going in that direction?

A. No, sir; he didn't hear i'.

Q. Don't know how they come to go that way?

A. They started off, he said.

Q. Did they start the road or trail?

88 A. They were in the big road; they went in the big road, he says.

Q. Is there a big road that runs up that way, the way he saw them going? [Witness is shown diagram again.]

Q. Ask him if there is a road runs up here that he saw them going up?

A. No, sir; there is no road there.

Q. I am speaking at the time they turned off?

A. He didn't understand; he says there is no road there now; he says there is a road out here, though.

Q. When you get up here there is a road running across the other way, is that it?

A. Yes, sir; he says they could see them until they got pretty near to this road here.

Q. There is a road running across this way, is there?

A. Yes, sir.

Q. He could see them until they got nearly to that road?

A. Yes, sir; he says this road goes up a steep hill.

Q. Ask him where this road up here leadws to.

A. He says he don't know where that road leads to.

Q. He has said they were going to their homes; did it lead to their homes?

A. He says there is a good many roads there going in all directions.

Q. Did they live up that way—Hicks and Stand Rowe?

A. Yes, sir; he says that oad would lead to Jack Colvard's house, and the other man's house too.

Q. If that is the case, the road going up towards Murphy's would lead away from thre home, would it not?

A. He says the big road follows the creek there, and it comes around in that direction; they could go around that way and go back home, but this is the most direct way.

89 Q. The way they started is the most direct way?

A. Yes, sir.

Mr. FREDERICK (of counsel for the defense). That is a straight trail?

The INTERPRETER. He says there is several roads there.

Q. Didn't he say a straight trail?

A. No, sir; he says it is the most direct road to their homes.

The DISTRICT ATTORNEY. The way they started?

A. Yes, sir.

Q. They had started to go this way and not to go the other way?

A. Yes, sir.

Q. And he says they all started together?

A. He says that Stand Rowe and the defendant here taken—that is, they went on that road, and Jack Colvard—they returned to where those boys were again, and then he wanted to go the way that the defendant and Rowe went.

Q. Then he took him up this way?

A. Yes, sir.

Q. He saw nothing more of them after they went up that way?

A. Yes, sir.

Q. But the deceased came down and went back here to the place here, and that is the last he saw of him until he found him over there dead?

A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

Q. Ask him how long he knew Jack Colvard?

A. He had known him between five and six years.

Q. Ask him if he talked Cherokee.

A. Yes, sir.

Q. Ask him if he didn't talk Cherokee that day when they all went out there and took a drink.

A. Yes, sir.

90 Ask him if he talked any English at all while he was out there taking a drink.

A. He says he don't know as to that; sometimes, whenever he cannot complete his sentence in Cherokee he could bring in an English word.

Q. Ask him if he didn't talk Cherokee.

A. No, sir; not very much, not very well, but he understood it all he said.

Q. Ask him if John Hicks and Stand Rowe and Jim Rowe didn't talk Cherokee and understand it well. And Mixater, and Jim Rowe, and all of those fellows.

A. He says they speak the Cherokee language good. They could not speak very good English.

Q. That is, Stand Rowe and John Hicks and Mixwater and Jim Rowe all speak the Cherokee language good, and don't speak good English?

A. He says the defendant here speaks both languages.

Q. Ask him where they got their whiskey?

A. Tom Gallcatcher had the whiskey.

Q. Didn't Stand Rowe buy the whiskey from Tom Gallcatcher?

A. No, sir; he says he don't know whether he did or not. He says it is very difficult to find out who is selling whiskey when you buy it in that way, unless you buy it yourself.

Q. Did he see Switch Foreman there—that is, after they went up the hill?

A. Yes, sir.

Q. Did he see him when he left Jim Rowe's?

A. Yes, sir.

Q. Which way did Foreman go—that is, when he left Jim Rowe's?

A. He says while they were there getting over the fence he was riding along, and he asked him where he was going.

Q. Foreman?

A. Yes, sir; and he says he told him he was going out to a man's house about half a mile distant.

Q. Foreman was?

91 A. Yes, sir; in the direction of Jack Colvard's, the way that Jack Colvard went around.

Q. That is towards Murphy's, was it not?

A. Yes, sir.

Q. He does not know whether Jack had gone then or not, does he?

A. No, sir.

Q. He does not know whether Jack left before Switch Foreman left or not.

A. No, sir; he does not know.

Q. Who was with Switch Foreman when he was riding off towards Murphy's?

A. He could not say; he was alone when he came back.

Q. When he went off, going towards Murphy's?

A. Yes, sir; he was alone.

Q. Now, how many other persons were riding along about the time that Foreman rode off?

A. There was a good many people riding around, but they had about all left then.

Q. He says that he saw nobody with any Winchesters there that night, except John Hicks and Stand Rowe, did he say?

A. Yes, sir.

Q. Did he see anybody with pistols?

A. He saw one.

Q. Who?

A. He saw Tom Gallcatcher with one the next morning.

Q. Was that the same morning of the shooting?

A. Yes, sir.

Q. Did he see Jack Colvard with a pistol?

A. No, sir; he did not see him with any, and when he found him lying in the road he didn't have any on him.

Q. He had a belt with cartridges in it, did he not?

A. He says he didn't notice for cartridges?

Q. Does he know whether Stand Rowe and Jack Colvard were friendly before then or not?

A. No, sir; he says he don't know.

Q. Does he know whether John Hicks and Jack Colvard were friends or not?

A. No, sir; he says not.

Q. He says he does not know?

92 A. Yes, sir; he hadn't seen them together before—well, he hadn't seen them together until then.

Q. Never did see them together before?

A. No, sir.

Q. Ask him what Colvard was going to give Stand Rowe clothes and a pair of boots and a hat for?

A. He says he don't know what the reason was.

Q. What did Stand Rowe say to him?

A. He didn't want to go.

Q. Was he just going to give him the clothes to get him to go home with him?

A. Yes, sir; that was all. If he would go by his house he agreed to do that for him.

Q. Was he any akin to Stand Rowe?

A. He says he don't know.

Q. Didn't he have Stand Rowe's girl for his wife?

A. He says Jack Colvard was a widower, and he would be over at Jim Rowe's a good deal, and it was the common report that he was——

The DISTRICT ATTORNEY. Never mind the common report; we do not want to go into a woman case on common report.

Mr. FREDERICK (of counsel for defendant). Would Stand Rowe's girl be over at Jim Rowe's?

A. Yes, sir; she staid there.

Q. Was she a married woman?

A. No, sir.

Q. Did she have any children?

A. No, sir.

Q. Didn't have any children?

A. No, sir.

Q. Has she got any now?

A. Yes, sir.

Q. How long ago since she had the baby?

A. He says he could not say how long it has been.

Q. Well, how long after Colvard was killed?

A. The nearest he can come to it the child must have been—it must be about seven months old now.

Q. Was she at Jim Rowe's the night of the dance?

93 A. Yes, sir; she was there.

Q. She was big with child then, wasn't she?

A. He says he supposes she was that way.

Q. She looked that way, didn't she?

A. He s'ys he can't tell anything about that.

The DISTRICT ATTORNEY. I would hardly think so if the baby was only three months old in her.

Mr. FREDERICK (of counsel for defense). Ask him if Jack Colvard was not the father of that child—if that was not the understanding?

The DISTRICT ATTORNEY. You need not ask him that question.

Mr. FREDERICK (of counsel for defendant). Ask him if Stand Rowe didn't complain about Jack Colvard keeping his girl?

A. No, sir; he never told him that, he says.

Q. Stand Rowe lived some distance from him?

A. A good ways.

Q. The girl stays down at Jim Rowe's?

A. Yes, sir.

Q. Ask him if the girl didn't stay at Jack Colvard's?

A. Yes, sir; it would be over there sometimes, and she would stay three or four or five days there at a time.

Q. How old was she?

A. About 20.

The DISTRICT ATTORNEY. Old enough to take care of herself.

Mr. FREDERICK (of counsel for defense). Now ask him if John Hicks could have gone home by taking the road and going down the way that he saw Switch Foreman going, if that would have been the way for John Hicks to go?

A. Switch Foreman went around the big road that goes around down the creek.

Q. Could John have gone home by going that way?

A. Yes, sir; he says he supposes so. He says he don't know
94 just exactly where John lives.

Q. That is down the creek, is it not?

A. Yes, sir; he sa's down the creek.

Q. Ask him if John didn't live down by that creek where it runs into Grand River?

A. Yes, sir: he lives near the mouth of the creek.

Q. When he saw Mixwater and Colvard and Rowe and Hicks going up the hill there, that was not in the road, was it?

A. No, sir; that wasn't in the road.

Q. That was just a trail, was it?

A. Before they got to this road they were not in the road he said. There wasn't any road until they got into the road on top of the hill.

Q. Ask him if t'ey didn't ride one right after the other; if one wasn't ahead, and then riding right along one after the other from the place where they took the drink and turned up *and* hill and went out of sight?

A. No; when they started they were all together, and they all went together, and he supposes they got into the road after they got up the hill——

Q. Tell him not to suppose anything. Ask him if they were riding one behind the other?

A. He says he could not say.

Q. Ask him if he was drunk that morning?

A. No, sir; he was not drunk, but he had drank some.

Q. Ask him what he was doing out behind the smokehouse, and didn't see Colvard leave; ask him what he was doing around there?

A. Jim Rowe wanted to talk to them about the officers that had been elected that election.

Q. They were not around there taking a drink?

A. No, sir.

95 Q. Didn't they have any whiskey?

A. No, sir.

Q. Ask him if Jack Colvard was ever an officer up there?

A. No, sir.

Q. Ask him if he was not a sheriff or a deputy sheriff up there at one time?

A. No, sir; he hadn't been up there in that district very long.

Q. What district did he come from?

A. He says he don't know for certain; he thinks, though, that he came from Coo-wee-scoo-wee district.

Q. Tell him to tell us who all was with him when he was around there talking with Jim Rowe about the officers being elected?

A. Eli Batt, Jim Rowe, and himself; just three.

Q. Was Tom Gallcatcher there?

A. No, sir.

Q. Was Tom Batt there?

A. He says he don't know whether he was there or not. That is all that I remember.

Q. Was Mixwater there?

A. No, sir; he had already left.

Q. Now, then, he says that Eli Batt and Jim Rowe were there?

A. Yes, sir.

Q. And who else?

A. And himself.

Q. Wasn't Tom Batt there?

A. He was around there, but he says he don't know whether he was standing near or not.

Q. Who else did he menti'n besides them?

A. He says he don't know; there was a good many around there; he does not know who all was there. There was some of the Downing boys there.

(Witness excused.)

96 ELI BATT, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Is your name Eli Batt?

Answer. Yes, sir; I can't talk English.

Q. (To interpreter.) Ask him if he was at the dance at Jim Rowe's on the night before the day that Jack Colvard was killed?

A. Yes, sir.

Q. Ask him if he saw the defendant and Stand Rowe there?

A. He says, "Yes, sir; I saw them."

Q. Did they have any arms?

A. They had two.

Q. What?

A. Winchesters.

Q. Did each of them have a Winchester?

A. Yes, sir.

Q. Did he see Colvard there?

A. Yes, sir.

Q. Was he armed?

A. He says he didn't see any.

Q. Now, ask him if he staid all night there?

A. Yes, sir.

Q. Ask him if the next morning he saw these parties there; that is, Stand Rowe, and the defendant, and the deceased?

A. Yes, sir.

Q. Did he see them when they left the house?

A. Yes, sir.
Q. If he saw them when they first left, which way were they going?
A. West; in the direction of their homes.
Q. They were going west?
A. Yes, sir;
Q. That would be towards Murphy's would it not?
A. Yes, sir.
Q. Who all was in the crowd?
A. Just the two, Stand Rowe and John Hicks.
Q. Where was Colvard?
A. He was at Jim's house.
Q. At Jim Rowe's house?
A. Yes, sir.
97 Q. How far did he go that way?
A. I don't know, for I never seen them any more, he says.
Q. Did he see them at any time before then?
A. Yes, sir.
Q. Tell him to tell about that; I want him to tell about that first. I want him to go back to the first time that they left.
A. Yes, sir.
Q. Tell him to tell about that; which way they went and all about it.
A. Yes, sir; they left.
Q. Who left? Tell him to state who they were first.
A. Stand Rowe and John Hicks.
Q. Was there anybody else with them?
A. No, sir; just those two.
Q. When was that?
A. It was in the morning.
Q. Tell him to go on and tell all about it, and see if he does not come out of the same hole.
A. He says he would rather you would ask the questions.
Q. No; tell him to go on and tell about it.
A. He says it was about 7:00 o'clock.
Q. Well, what was it was about 7 o'clock?
A. It was about 7 o'clock in the morning when they left, he says.
Q. Tell him to go on and tell all about it, where they went to, and if they came back, and all about it.
A. They went in a westerly direction.
Q. The two together?
A. Yes, sir.
Q. Where was Colvard?
A. At the house.
Q. Colvard was at the house?
A. Yes, sir.
Q. And these two left, going in a westerly direction?
A. Yes, sir.
Q. Did he see anything more of them?
A. No, sir.
98 Q. I thought it would come out of the same hole; that is just exactly what I said in the first place. Ask him if he saw a crowd going off together before that, going up the road and taking a drink, in a bunch?

A. Yes, sir; he says he was along with them.

Q. Now, who was in that crowd?

A. John Hicks there, Stand Rowe, Jack Colvard, and William Batt, his brother, and himself, he says, was along.

Q. Where did they go now—that is, where did they start to go?

A. Up above a little piece.

Q. What did they start to go for? Tell him to go on and tell something that he knows, and *quit* this foolishness with me; I am getting sick of it.

A. They went out to take a drink.

Q. Why didn't he say so long ago? Where did they go now?

A. He says they went out about 100 yards from the house.

Q. In what direction?

A. East of the house.

Q. Ask him if they didn't start to go west, a little west first, and then come back?

A. He says he don't know.

Q. How far east, did he say?

A. They went, he says, 100 yards.

Q. What did he do when they got there to that place?

A. Didn't do anything.

Q. Didn't take a drink?

A. No, sir.

Q. I thought he said they went out there to take a drink?

A. Yes, sir; that is what they went out there for, but they didn't drink any.

Q. Why?

A. He says there were so many people around there.

Q. A good many people there, was there?

A. Yes, sir.

Q. When they were out there what became of Colvard?

99 A. He went back towards Jim's.

Q. Colvard did?

A. Yes, sir.

Q. What became of Hicks and Stand Rowe?

A. That is what he was talking about while ago, he says; he says they went in a westerly direction then?

Q. Stand Rowe and the defendant went in a westerly direction from there?

A. Yes, sir.

Q. Did he see Colvard go with them or a part of the way?

A. No, sir.

Q. But he saw the defendant and the other man, Stand Rowe, go west?

A. Yes, sir.

Q. Going towards their home, did he say?

A. Yes, sir; he says they said they were going home.

Q. Were they on a road when they were going up that way, or were they going to a road, or how was that?

A. They went a road.

Q Q. Was there a road leading up that way?

A. Yes, sir.

Q. Where did that road lead to? Tell him to waken up.
A. He says he supposed it lead to their homes; they started home.
Q. Does he know where the Saline Court-House is?
A. Yes, sir.
Q. Was it that road?
A. Yes, sir.
Q. Ask him if Colvard didn't live on that road?
A. Yes, sir.
Q. Did Colvard go up that road anyways?
A. No, sir.
Q. After the defendant and Stand Rowe left what did they do, the rest of them?
A. He says that were all out at Jim Rowe's house.
Q. Did they go back to Jim Rowe's house; they could not go there without going back, could they?
A. No, sir; he says they went back.
100 Q. Who else went back?
A. He says they all went back.
Q. What did they do after they got back to the house?
A. He says he played the fiddle when he got back to the house.
Q. He is there yet playing the fiddle is he? I want to get away from there somehow or another. Ask him if he is still playing the fiddle?
A. No, sir; he says he is not.
Q. How did he get away?
A. He says he guesses he just walked away.
Q. How long did he stay there and play the fiddle?
A. Just a short time.
Q. Did Colvard come in?
A. No, sir.
Q. Ask him what is the matter with him; ask him if he has been drinking?
A. No, sir; he says he has not been drinking.
Q. Tell him to go on then and talk. Tell him I want to know about this thing. Tell him he need not set there and gap, but to go ahead and tell it. Is he any relation of Hicks?
A. No, sir; he says not.
Q. Is he afraid of him?
A. No, sir.
Q. Then why does he not go ahead and tell about this thing without waiting for ten thousand questions?
A. That is all he knows, he says.
Q. All he knows is he went back to the house and played the fiddle. Ask him if he heard the guns fire?
A. No, sir.
Q. Ask him if anybody got killed?
A. Yes, sir.
Q. Well, who was it?
A. Jack Colvard.
Q. Ask him, then, if he does not think something else did happen besides his playing the fiddle. Ask him when he got back to the house how he found out that a man was killed?

101 A. While he was playing the fiddle Tom Batt came in and told him that Colvard had been thrown off of his horse and probably killed, but when he got out there——

Q. He was told that?

A. Yes, sir.

Q. How long was that after he had gone back to the house that he was told that?

A. He had been there about half an hour.

Q. He had been there about half an hour after he had seen Hicks and Rowe leave, had he, before he heard of the killing?

A. Yes, sir; about that.

Q. Ask him if he went to the body, where the man was laying there dead?

A. Yes, sir.

Q. Where did he find him?

A. About 75 yards from the house.

Q. 75 yards from Jim Rowe's house?

A. Yes, sir; 75 steps.

Q. Ask him if it was not 200?

A. No, sir.

Q. 75 steps?

A. Yes, sir.

Q. Ask him if he was sober or drunk at that time?

A. He says he wasn't drunk.

Q. He never drinks?

A. Yes, sir; he drinks.

Q. Ask him in what direction the body was?

A. West.

Q. In the same direction, then—he had gone east, and now it was lying west. He was lying between Rowe's house and Murphy's house, was he not?

A. Yes, sir.

Q. Nearest to whose house, Murphy's or Jim Rowe's?

A. Nearest to Jim's.

Q. Was he alive or dead?

A. He was dead.

Q. Did he have any bullet holes in him?

A. Yes, sir.

Q. How many bullet holes did he have in him?

A. Only one.

Q. Was there any in his clothing?

A. Yes, sir.

102 Q. Ask him if he does not think he could have told the whole of that by one simple question; if he could not told there was one bullet hole in the man and one in his clothes by one question?

A. Yes, sir; there was a bullet hole in his clothes, right along here, and through his under clothing.

Q. One shot through and through this way?

A. Yes, sir; the hole was right here.

Q. Does he know whether it went clear through?

A. Yes, sir.

Q. Where did it come out?

A. In the back here.

Q. About the middle of the back.

A. Yes, sir.

Q. Ask him if it went straight through the man?

A. He had been shot in the left breast here, and it came out on the left side of the spinal column. He says he could not see whether it went straight through or not.

Q. He says he saw where it went in and where it came out?

A. Yes, sir.

Q. Ask him if he can not tell whether it went straight through or not?

A. Yes, sir; he says he supposes it went straight through. It came out here and went in there.

Q. After he saw Stand Rowe and the defendant leave him; ask him if he saw them any more?

A. No, sir.

Q. Did they carry their guns with them?

A. Yes, sir.

Q. Were they going towards where he afterwards saw the body or were they going in another direction.

A. Yes, sir; he says they went in the direction of where they found the body.

Q. That is about half an hour before?

A. Yes, sir.

Q. Ask him if he thinks he knows what he is talking about?

A. Yes, sir.

103 Q. I believe I understand him to say that his party came from the house and went directly east, when they went down to take a drink, is that right?

A. Yes, sir.

Q. Then he says these two parties left, going west?

A. Yes, sir.

Q. Then they must have gone right back again over the same road—right by Jim Rowe's house, did they?

A. Yes, sir.

Q. Went right back over the same road, did they?

A. No, sir.

Q. Well, if he went off east that way, and then they went back west, they must have gone over the same road, tell him. It is impossible for them to have gone any other way. They went down from Jim Rowe's—the crowd did—went from Jim Rowe's down east and got a drink, didn't they?

A. Yes, sir.

Q. Then Stand Rowe and the defendant left, going off that way, or did they go back?

A. They went back the way they come.

Q. He has said they didn't go back the way they come, and he has said they did; now, which is right?

A. He says this other is right; that they went back the same way they came.

Q. Went right back again past the house, past Rowe's house? He saw that, did he? That they came right back past Rowe's house?

A. Yes, sir.

Q. And he came back right behind him, did he; that is, after they took a drink?

A. Yes, sir.

Q. Is that right?

A. Yes, sir; he says he went back to the house after they left.

Q. Did he go back right after they came back—follow them back—when he left the place where they took the drink?

A. He says he didn't follow them.

Q. Did he go the same road they did?

A. Yes, sir.

104 Q. Travelled over the same road in going back that they had when they went back after going out and taking a drink, did he?

A. Yes, sir.

Q. Tell him to step here and examine this diagram. (Witness does as requested, and is shown diagram of the surroundings of the place of the killing.)

A. Ask him, when Stand Rowe and the defendant left, which way did they go?

A. They come back this way.

Q. He saw them going back by this house, did he?

A. Yes, sir.

Q. Ask him if he has been talking with anybody to-day about this case? Ask him if he has been talking with anybody since he talked with me last night?

A. No, sir.

Cross-examination by Mr. FREDERICK:

Ask him if he has not been a member of the council up there in his nation?

A. Yes, sir; he says he has.

The DISTRICT ATTORNEY. God save the council.

(Witness excused.)

105 JOE DOWNING, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, through an interpreter, and testified as follows, to wit.

Question. Ask him his name.

Answer. Joe Downing.

Q. Ask him if he was at the dance at Jim Rowe's at the time that Mr. Colvard was killed.

A. Yes, sir; he says he was there.

Q. Now, did he stay all night?

A. Yes, sir.

Q. Ask him if he saw the defendant there and Stand Rowe.

A. Yes, sir.

Q. Ask him if he knew Jack Colvard in his lifetime.

A. Yes, sir.

Q. Was he there?

A. Yes, sir.

Q. Ask him if he saw them when they left.
A. Yes, sir; he says he saw them.
Q. Tell him to tell about it; how they left, and all about it.
A. Jack Colvard left first.
Q. How far ahead?
A. Well, Jack Colvard was just about ten yards ahead when the other man started—when the two started.
Q. When who started?
A. The defendant here, and Stand Rowe.
Q. Was there anybody with Jack Colvard?
A. He went in the direction of the Tahlequah road and stopped a little bit there.
Q. Ask him if there was anybody with him.
A. Yes, sir; there was three together.
Q. Who were they?
A. William Batt, and he was along——
Q. You get wrong on that. I ask you when the defendant went
106 off, when Colvard rode off, if there was anybody with him, from the place where they went to drink, when he rode off from there?
A. Mixwater.
Q. How were they; were they riding two horses or one?
A. They were both on one horse.
Q. Now, he says that he saw Colvard start ahead about ten yards and then he saw the defendant and Stand Rowe start off; now, where was Colvard going to?
A. Mixwater was taking him home.
Q. Which way was he going?
A. In the road down that way. In that direction.
Q. In what direction?
A. In an eastern direction.
Q. Ask him if he knows where the road is that leads up to Saline court-house.
A. No, sir; he does not. That was the first time he had ever been there.
Q. He saw them going in that direction; tell him to go on and state what they did after that. He saw them going off; did he see any of them come back again?
A. Yes, sir; they came back.
Q. Who did?
A. Jack Colvard; he says he was in the house when he came back.
Q. Then he had gone back to the house, had he?
A. Yes, sir; when they were outside he saw Jack Colvard standing by the yard fence.
Q. Was he on his horse or off of it then?
A. On his horse.
Q. In front of the house or to one side?
A. A little behind the house, back from the house.
Q. Now tell him to go on and state if he saw anything more of either Stand Rowe or Hicks after that. First ask him if anybody was
107 with him when he first saw him back there—if anybody was with Colvard.
A. No, sir; there wasn't anyone with him.

Q. Was Mixwater with him?

A. No, sir; Mixwater wasn't with him.

Q. Tell him to go ahead, now, and tell what occurred after that.

A. After he went out of the house into the yard he stood about 6 steps from the fence, and he stood there fore some time, he says.

Q. About how long did he stand there?

A. He stood there about a quarter of an hour.

Q. Then what occurred?

A. He says Jack Colvard stood there for sometime; he was not saying anything; he was pretty drunk, but he had come back after the defendant here.

Mr. FREDERICK (of counsel for defense). Who had come back?

The INTERPRETER. He says the defendant had come back after him.

The DISTRICT ATTORNEY. How does he know that the defendant was the one that Colvard came back after; how does he know that Colvard had come back after the defendant?

A. He says he told the defendant himself that he had come after him.

Q. I do not quite understand that. He says Jack Colvard was out there by himself, and yet he tells the defendant to come back after him; tell him to explain that. I think you have got that wrong, Mr. Interpreter.

A. He says that the defendant here came to where Colvard was, and said that "Stand Rowe wants you out yonder."

Q. The defendant came back to him while he was standing out there, and told Colvard that he had come for him, and that Stand Rowe wanted to see him out there?

A. Yes, sir.

Q. He says he was standing out there about a quarter of an hour?

A. Yes, sir.

108 Q. Then Hicks came back to where Colvard was?

A. Yes, sir.

Q. He corrected you upon that, did he not?

A. No, sir; he didn't say anything about that.

Q. How did you get it corrected then; you first stated——

A. Well, of course, from what he said the second time——

Q. Hicks came back to where Colvard was—ask him if he saw Hicks come back.

A. Yes, sir; he says he saw him.

Q. Which way did he go?

A. In that direction [he points to the west].

Q. He came from the west?

A. Yes, sir.

Q. Is that what he tells you?

A. Yes, sir.

Q. Was Stand Rowe with him?

A. No, sir.

Q. How did he come?

A. He come ahorseback.

Q. When he came to where Colvard was, what did he say to him? Try to give it in his exact language if you can. What did the defendant, Hicks, say to Colvard? I understood him to say that he came back. Ask him, first, if he did ride up to Colvard.

A. That is all that he said.

Q. Wwell, what was it: repeat it, and give the exact language, the exact words what he said to Colvard when he came.

A. "I have come after you; Stand Rowe wants to see you," he told him.

Q. Did Colvard say anything or do anything?

A. He said, "All right."

Q. Then what did they do?

A. He says that the defendant here went back the way that he came.

Q. What became of Colvard?

A. He taken a trail rather in this direction from where the other man went.

Q. Tell him to step down here and look at this diagram. (The witness accordingly steps down and is shown a diagram of the sur-
109 roundings of the place of the killing.)

Q. When they went back, ask him if they went back this way [indicating on diagram]?

A. Colvard took this one.

Q. Which one did Hicks take?

A. This one here.

Q. Hicks went back the way he came, and the deceased, Colvard, took this trail here?

A. Yes, sir.

Q. Ask him after Colvard left Hicks if he heard any guns fired?

A. Yes, sir.

Q. How long after they left was it before he heard the guns fire, if he can tell?

A. About an hour afterwards.

Q. Was it an hour?

A. Yes, sir.

Q. How many?

A. Two.

Q. Did he see anybody after that; did he see Colvard after that?

A. I didn't see him alive any more; I saw him dead, he says.

Q. Did he go up to the place?

A. Yes, sir.

Q. How come him to go up?

A. They were going up there, and so I went along.

Q. How did he find out there was anybody hurt up there, or killed?

A. Switch Foreman first brought the news. He says Switch Foreman had left Jim's house and went in the direction that Jack Colvard had gone; and he was not gone but just a little while until he came back?

Q. He came back and brought the news?

A. Yes, sir.

Q. And then he went up (the witness)?

A. Yes, sir.

Q. And found the dead body there?

A. Yes, sir.

Q. Now, then, did he know where Stand Rowe was when Hicks came there and told him that Stand Rowe wanted to see him out there?

A. No, sir.

Q. Had he seen him any more after he and Hicks left, just
110 after they went down the road to take a drink?

A. No, sir; he had not saw any more of them—or of Stand Rowe, I mean.

Q. I believe he says he didn't see Colvard when he came back, or when he came out of the house and found him there?

A. No, sir; he didn't see him coming; he didn't see him until he was there.

Q. He found him out there, and that is after Mixwater had started to take him home?

A. Yes, sir.

Q. Ask him if Jim Downing is his brother?

A. Yes, sir.

Q Was Jim there?

A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

Ask him who else heard John Hicks tell Colvard that Stand Rowe wanted him.

A. He says he don't know that anybody else heard it; there was two men standing tolerably close, about 10 steps away.

Q. How close was he when he heard it?

A. About 6 steps.

Q. They were about 10?

A. Yes, sir.

Q. Who were they?

A. Bill Downing and Jim Downing.

Q. Did he speak in English or Cherokee?

A. In Cherokee.

Q. He spoke Cherokee to Colvard?

A. Yes, sir.

Q. Downing is his brother, is he?

A. Yes, sir.

Q. He says he does not think anybody else heard Hicks tell Colvard that Rowe wanted him?

The DISTRICT ATTORNEY. He didn't say that.

Mr. FREDERICK. Ask him if he said he did not think anyone else heard John Hicks say that.

A. Yes, sir; that is what he said.

111 Q. He says there was two other persons standing about 10 step away; who were the two persons?

A. Bill Downing and Jim Downing.

Q. They were his brothers?

A. Yes, sir.

Q. They were about ten steps away?

A. Yes, sir.

Q. What were they doing?

A. They were not doing anything.

Q. Were they sitting down or standing up?

A. Standing up.

Q. Were they talking with each other?

A. Well, he says he does not know whether they were talking or not.
Q. Were they looking at each other?
A. No, sir.
Q. Which way were they looking?
A. He says he does not know which way they were looking. He says they were standing near the yard fence.
Q. Were they looking towards him?
The DISTRICT ATTORNEY. He says he does not know which way they were looking.
Mr. FREDERICK (of counsel for defense). I am asking him if they were looking towards him.
The INTERPRETER. He says he does not know which way they were looking.
Q. What was he doing?
A. Nothing. He had just come out of the house and was standing there.
Q. Was John Hicks riding or walking?
A. He was riding.
Q. How close was Hicks to Colvard?
A. About 4 steps.
Q. Was Colvard on his horse?
A. Yes, sir; he was on his horse.
Q. Where was Mixwater?
A. He had gone home.
Q. Now, which one left first, Hicks or Colvard?
A. John Hicks left first.
Q. How long was it until Colvard left?
A. Right directly afterwards?
112 Q. Who went off with Colvard?
A. He went alone.
Q. Where was Switch Foreman then?
A. He was at Jim's.
Q. Switch Foreman was riding, too, was he not?
A. Yes, sir.
Q. Had he got on his horse before Colvard left?
A. Yes, sir; he was on his horse.
Q. How close was he to Colvard; that is, how close was Switch Foreman to Colvard when Hicks came up and spoke to Colvard?
A. Well, he was not around then, he says.
Q. Where was Switch then?
A. He says he does not know; he must have been in the house.
Q. Now, did he say while ago that Switch Foreman rode off first, before Colvard or Hicks?
A. No, sir.
Q. He didn't do it?
A. No, sir.
Q. He says now that Hicks went off first, does he, and then Colvard went off?
A. Yes, sir.
Q. How far did Colvard go before Switch Foreman rode off?
A. It was sometime afterwards before he went.

Q. Did Colvard come back any more?
A. No, sir.
Q. Did John Hicks come back?
A. No, sir; he didn't come back.
Q. He thinks it is about an hour after Hicks and Colvard left before he heard the shooting?
A. Yes, sir; about that time.
Q. Where was Bill Batt when John Hicks asked him that and came there?
A. He says he didn't see him at the time; don't know where he was.
Q. Where was Tom Batt?
A. He was in the house; in the other house from where he had been.
Q. Where was Jim Rowe?
A. He says he don't know where he was.

Q. Where was Clarke Collins at the time that John Hicks went
113 up there and told him that Stand Rowe wanted him out there?
A. He says he does not know the man.

Q. Did he know Clarke then?
A. No, sir.

Redirect-examination by the DISTRICT ATTORNEY:

Ask him about how long Switch Foreman was gone before he came back and reported about the killing?
A. He wasn't gone very long.
Q. Just a short time?
A. Yes, sir.
Q. When he found the body he came back immediately?
A. Yes, sir.
Q. And told them about it?
A. Yes, sir.
Q. Told them that he found the body—what did he say about it?
A. He said, "This Jack Colvard is lying out there and his clothes are bloody, and I reckon his horse must have thrown him.
(Witness excused.)

Here court adjourned until Saturday morning, March 4th, 1893, 8:30 o'clock.

114 SATURDAY MORNING, *March 4th*, 1893.

DAVE ROGERS, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Is your name Dave Rogers?
Answer. Yes, sir.
Q. Are you a Cherokee Indian?
A. Yes, sir.
Q. Do you know the defendant, Hicks?
A. Yes, sir.
Q. Did you know Stand Rowe in his lifetime?
A. Yes, sir.
Q. And Colvard, the deceased?

A. Yes, sir.
Q. Were you at the dance?
A. Yes, sir.
Q. What time did you go to the dance at Jim Rowe's?
A. I went there in the morning, the morning before the dance.
Q. Did you go there on the day the killing was done or the day before?
A. The day before.
Q. You went there on the morning before you were there at night—you were there all day before, were you?
A. Yes, sir.
Q. Did you see the defendant and Stand Rowe there?
A. Yes, sir.
Q. What time did they come?
A. They come in after dark; I could not say what time they come in.
Q. Were they armed?
A. Yes, sir.
Q. How were they armed?
A. They had Winchesters apiece.
Q. Did you see Colvard when he came?
A. Yes, sir; I met Colvard before he came to the house.
Q. What time did he come there?
A. It was along about midnight.
Q. Now, you remained until the next morning?
A. Yes, sir.
115 Q. Where were you at the time that Colvard was killed?
A. I was at Jim's.
Q. Were you at the house?
A. Yes, sir.
Q. I will ask you if a short time before the killing you saw the defendant and Stand Rowe?
A. Yes, sir.
Q. Where were you?
A. I was at Jim's.
Q. Were you at the house a short time before the killing?
A. Yes, sir.
Q. Did you see them as they were leaving?
A. Yes, sir; I was up the hollow from the house when I saw them leaving.
Q. What direction is that from the house where you were?
A. It is right north.
Q. How far from the house were you?
A. I was about 100 yards, maybe a little over.
Q. You were up the hollow a little north from the house, 100 yards or maybe a little over; was there anybody with you?
A. Yes, sir; there was Tom Batt with me.
Q. Now, about what time was that, or do you know; about what time in the morning was it?
A. It was tolerably early; about 7 or 8 o'clock.
Q. Now, then, please state if you saw these two men, and if so, what were they doing, and where were they going; what direction?
A. They were going right northwest.

Q. Going northwest?
A. Yes, sir.
Q. And that was the defendant and Stand Rowe?
A. Yes, sir.
Q. Was Colvard with them when you saw them?
A. No, sir.
Q. They were going west?
A. Yes, sir.
Q. How far were they from you?
116 A. Well, they were about 100 yards, I guess.
Q. In what direction from you were they when you saw them riding along going northwest—you say they were going northwest?
A. Yes, sir.
Q. What direction were they from you; you were out now 100 yards or so north of Jim's Rowe's house, and you saw them going in a northwest direction?
A. Yes, sir.
Q. Now, in what direction were they from you; in which way did you have to look to see them; if you were facing to the north on which side did they pass, to your right or left?
A. They passed on the north side.
Q. They passed then to the right?
A. Yes, sir (witness is here shown diagram).
Q. You say you were 100 yards north of the house?
A. Yes, sir.
Q. You say that Tom Batt was with you?
A. Yes, sir.
Q. These two men passed you going in a northwestern direction?
A. Yes, sir (witness here locates on diagram his position at the time spoken of by him above).
Q. Where did you see them pass?
A. They passed along here (indicating on diagram.)
Q. About 100 yards from you?
A. No, sir; they wasn't that far from me.
Q. How far?
A. Just a little piece.
Q. Do you know where the trail is down there Stand Rowe is said to have passed when he went down to the place of the killing? Do you know that trail?
A. Yes, sir.
Q. Had they reached that trail yet?
A. I could not say.
Q. You could not say whether they had reached the trail or not?
A. No, sir.
117 Q. You don't recollect that?
A. No, sir.
Q. They were going in a northwestern direction?
A. Yes, sir.
Q. Were the defendant and Stand Rowe horseback?
A. Yes, sir.

Q. They were going in the direction if they hadn't reached the trail they would cross it if they went far enough?

A. Yes, sir.

Q. Did you notice whether they had any arms with them at that time?

A. Yes, sir.

Q. What did they have?

A. They had Winchesters.

Q. Now, Colvard wasn't with them at that time when you saw them?

A. No, sir.

Q. Now then, how long was that before the killing? Did you hear the guns fired?

A. Yes, sir; I heard the guns fire.

Q. How long was that when you saw them passing up in a northwest direction before the guns fired?

A. It was about an hour, I guess.

Q. Did you see either of them any more that day; either Stand Rowe or the defendant?

A. No, sir.

Q. Did you see Colvard any more after you saw them pass going northwest?

A. Yes, sir; I saw him when I came back to the house.

Q. You came back to the house before the guns fired, did you?

A. Yes, sir.

Q. Where was he when you came back?

A. He was back up the road where these men started from.

Q. Up the road?

A. Yes, sir.

Q. In what direction?

A. East.

Q. Up east?

A. Yes, sir.

Q. Was there anybody else up there?

A. There was three or four more men up there.

Q. Do you know who they were?

118 A. There was Bill Batt, and Jim Rowe.

Q. Was there anybody else that you remember?

A. There was somebody else with him, but I don't recollect who it was now.

Q. Bill Batt and Jim Rowe were up east of the house?

A. Yes, sir.

Q. Do you know what they were up there for, what they went there for, that crowd up there east?

A. No, sir.

Q. At any rate that is in an opposite direction from Murphy's; Murphy's is west?

A. Yes, sir.

Q. They were up there?

A. Yes, sir.

Q. When you got back Colvard was with those parties?

A. Yes, sir.

Q. How long after you saw these two men riding across there until you came back to the house?

A. Well, when those two men passed to come up that hollow then I just came on back up to the house.

Q. You came right back to the house then, did you?

A. Yes, sir.

Q. What were you up there for in that hollow?

A. I was looking for a fellow's hat he had lost.

Q. Who was it?

A. Drywater.

Q. It wasn't Mixwater?

A. No, sir.

Q. Was Mixwater there?

A. Yes, sir.

Q. And Drywater, too?

A. No, sir.

Q. Were there any of the rest of the water family there? [Laughter.] You were looking for a hat?

A. Yes, sir.

Q. When you came back, now, Colvard was up with those men?

A. Yes, sir.

Q. Do you know whether he came back to the house or not?

A. Yes, sir; he came back to the house but he didn't get off the horse.

119 Q. Do you know where he went or what he did?

A. No, sir.

Q. What part of the premises did you see him at when he came back?

A. He was back of the house; he stopped back of the house, and we all went in the house.

Q. He stopped at the back of the house?

A. Yes, sir; he was on a horse.

Q. Was he on the inside or outside of the yard?

A. Outside of the yard.

Q. On the north, south, east, or west?

A. Right on the north side of the house.

Mr. FREDERICK (of counsel for defense). That was Colvard?

The WITNESS. Yes, sir.

The DISTRICT ATTORNEY. Stopped outside of the yard by the fence?

A. Yes, sir.

Q. You went in the house?

A. Yes, sir.

Q. Were you there when Colvard left?

A. I guess I was in the house.

Q. You didn't see him leave?

A. No, sir.

Q. You don't know anything about how he came to leave or anything about that?

A. No, sir.

Cross-examination by C. J. FREDERICK:

What was Colvard doing when yoou got back there? When you went back from up in the hollow, from where you were hunting that fellow's hat, who went with you?

A. Tom Batt.

Q. You and Tom Batt went back to the house?
A. Yes, sir.
Q. Colvard was not there when you got back, was he?
A. No, sir.
120 Q. You went right in the house as soon as you got there, did you?
A. No, sir; just stood around at the yard.
Q. Did you stay around in the yard until Colvard came back?
A. No, sir; I went up there where they were.
Q. What were they doing up there?
A. They were not doing anything; they were just all standing there in the road.
Q. Why can't you tell us who all was up there? You say that Bill Batt and Jim Rowe was up there; who else was up there if they were all standing up there?
A. I knew the men, I guess, but I don't recollect them now.
Q. What did you go up there for?
A. I just went up there to be a going.
Q. Didn't you go up there to get a drink?
A. No, sir.
Q. You hadn't had a drink that morning, had you?
A. Yes, sir; I had.
Q. How many?
A. I took one drink.
Q. Just one?
A. One or two; I don't know.
Q. How many did you drink during the night?
A. I don't know how many drams I took that night.
Q. A good many?
A. Yes, sir; I took a good many.
Q. You were sober?
A. Yes, sir; I still staid sober.
Q. You took a good many drinks that night and one or two that morning, and you were still sober?
A. Yes, sir.
Q. What were you drinking?
A. I was drinking whiskey, I thought.
Q. Won't whiskey make you drunk?
A. Yes, sir; if I drink enough of it.
Q. How much does it take to make you drunk?
A. I don't know.
Q. You never tried it?
A. No, sir.
121 Q. You never did get drunk?
A. Yes, sir; I gets drunk sometimes.
Q. You ought to have some idea about how much it takes to make you drunk; why did you go up there where Colvard and Bill Bat and Jim Rowe were?
A. I just went up there to be going.
Q. How far did you have to go?
A. About 100 yards.
Q. How long did you stay up there?

A. I didn't stay long; when I got there these fellows were about ready to go back to the house, and I just turned around and went back with them.

Q. Were you all walking?

A. Jack was horseback, and the rest of them were on foot.

Q. Was there anyone on the horse with him?

A. No, sir.

Q. Where was Mixwater?

A. He had went on.

Q. He had gone home?

A. Yes, sir; when I got there.

Q. Did Jack go back before you did?

A. Back to the house?

Q. Yes, sir.

A. No; we went back together.

Q. You walked along by his side?

A. I didn't walk along by the side of him.

Q. How did you go, then?

A. He was behind me.

Q. Then you came on ahead of him?

A. Yes, sir.

Q. Did Jack get down when he came back?

A. No, sir; he sit on the horse when I went in the house, as far as I know.

Q. You never saw him any more after you went in the house?

A. No, sir.

Q. You don't know whether he got down or not, do you?

A. No, sir.

Q. About how long was it after you went in the house until you heard the guns?

A. I could not say; it was not long, though.

Q. Well, about how long?

A. About half an hour, I guess.

122 Q. What were you doing in the house?

A. I was just in there.

Q. Were you playing the fiddle?

A. No, sir.

Q. Who was?

A. There was nobody playing the fiddle that I know of.

Q. Was Eli Batt in the house?

A. Yes, sir.

Q. Was he playing the fiddle?

A. I don't know; I was in the kitchen; there was two houses, and some of them were in the other house and I was in the kitchen.

Q. Were you in there to get your breakfast?

A. No, sir.

Q. What were you doing in the kitchen?

A. Nothing.

Q. Didn't you go in and lie down to rest a little bit?

A. No, sir; I didn't lay down.

Q. Was there anybody in the kitchen with you?

A. Yes, sir.
Q. Who?
A. Tom Batt was in there.
Q. Just you and Tom; what were you and Tom doing in the kitchen; you and Tom had been up the hollow together hunting a hat; did you find the hat?
A. No, sir.
Q. You were hunting Drywater's hat?
A. Yes, sir.
Q. Where was Drywater?
A. He had went on home.
Q. He didn't wait for his hat?
A. No, sir.
Q. You and Tom then went into the kitchen?
A. Yes, sir.
Q. How long did you and Tom stay in the kitchen?
A. Well, we staid in there until we heard that Jack Colvard was killed, and we went out together.
Q. Were there any women at that dance?
A. Yes, sir.
Q. Were there any women there that morning?
A. No, sir.
Q. The women had all gone?
A. Yes, sir.
Q. You had all got to' tight for them, had you?
A. Yes, sir; I guess so.
123 Q. The women had scattered?
A. Yes, sir.
Q. Were there any women in the kitchen when you were in there?
A. No, sir.
Q. She had gone, too?
A. Yes, sir.
Q. The cook had gone, had she?
A. Yes, sir; there was no women there.
Q. Were there any women on the place at all?
A. Yes, sir; there was—no, there wasn't that morning.
Q. All the women had gone?
A. Yes, sir.
Q. Just left the field clear to you men?
A. Yes, sir.
Q. How many men were there then?
A. I don't know.
Q. Several?
A. Yes, sir.
Q. How much whiskey did you see around there that morning?
A. I seen one bottle.
Q. It had got pretty scarce by that time, hadn't it?
A. Yes, sir.
Q. Who was it had it there, Tom Gallcatcher?
A. No; Tom Gallcatcher didn't have the whiskey that I seen.
Q. Didn't he that night?

A. I didn't see him with any.
Q. Who had it?
A. Switch Foreman had the whiskey.
Q. Well, how much did he have?
A. He had a gallon.
Q. Who else had whiskey?
A. He is all the one I know.
Q. There must have been more than a gallon there among you men?
A. There might be.
Q. How many men were there?
A. I didn't count them.
Q. Well, about how many; you have not counted the men in this court room, but you could tell is there is a good many here, could you not; was there as many as a dozen?
A. There was over a dozen.
124 Q. Was there 20?
A. Yes, sir; there was about that many.
Q. About 20?
A. Yes, sir.
Q. And of that 20 men there were a considerable number of them drunk, were there not?
A. No, sir; not all of them.
Q. You say you staid in the kitchen, you and Tom Batt; how long did you stay in there?
A. About half an hour.
Q. You don't know who passed along the road and came by there before you went in the kitchen, do you?
A. No, sir.
Q. You don't know whether John Hicks came by there or not?
A. No, sir.
Q. You don't know whether Stand Rowe came or not, do you?
A. No, sir.
Q. You didn't see anybody riding along?
A. No, sir.
Q. You didn't see Jack Colvard leave?
A. No, sir.
Q. Everybody had been peaceable there that night, hadn't they? Had there been any difficulties, any fuss?
A. No, sir.
Q. Didn't Drywater get into a fight and get himself beat up?
A. Yes, sir; that morning.
Q. Who did that?
A. Some of them Lacey boys.
Q. You saw John Hicks there that night, did you?
A. Yes, sir.
Q. He was peaceable, was he not?
A. Yes, sir.
Q. He was sober, too, was he not?
A. Yes, sir; he seemed to be sober.
Q. Was Jim Rowe sober?
A. Yes, sir.

Q. And Stand Rowe?
A. Yes, sir.
Q. How was Jack Colvard?
A. Jack was drunk, I think.
Q. When did Jack get drunk?
A. He got drunk that night sometime.
125 Q. He got up and got sober, too, didn't he, after that?
A. Yes, sir.
Q. He was sober that morning, was he not?
A. I don't know whether he was sober or not.
Q. Did he appear to be sober?
A. He appeared to be drinking and drunk.
Q. What time did Jack Colvard get there that night?
A. About midnight.
Q. Didn't he get there just about 10 o'clock?
A. I don't know.
Q. Was he not down, drunk, about 11 o'clock that night?
A. I do not know.
Q. Did you see him down, drunk?
A. No, sir; I didn't see him.
Q. You are no kin to Jack Colvard, are you?
A. No, sir.
Q. Are you any kin to Mr. Ingram?
A. No, sir.
Q. Mr. Whittaker?
A. No, sir.
Q. Are you any kin to John Hicks?
A. No, sir.
Q. You know John, do you?
A. Yes, sir.
Q. How long have you known him?
I don't know for certain, one or two or three years.
Q. Do you know whether Colvard and Stand Rowe were friendly before that or not?
A. No, sir; I do not.
Q. Did you see Colvard and Stand Rowe talking together that night or that morning?
A. No, sir.
Q. Didn't see them talking together?
A. No, sir.
Q. Did you hear Jack Colvard talk any that night?
A. Talking to Stand Rowe?
Q. Did you hear him talking to anybody?
A. Yes, sir.
126 Q. What was he talking, Cherokee or English?
A. He was talking Cherokee part of the time and talking English.
Q. When he was talking to you he was talking Cherokee, was he?
A. He didn't talk to me.
Q. You talk Cherokee, do you not?
A. Yes, sir.

Q. Jack talked Cherokee?
A. Yes, sir; he talked a little, not much.
Q. He talked so you could understand him very well in Cherokee, didn't he?
A. Yes, sir.
Q. Carry on a conversation in Cherokee?
A. Yes, sir.
Q. You can talk Cherokee and English both, can't you?
A. Yes, sir.
Q. Are you friendly with John Hicks?
A. Yes, sir; I am friendly to anybody.
Q. You are a friend to anybody?
A. Yes, sir.
Q. You must be a good man, you are a friend to everybody?
A. Yes, sir.
Q. Well, that's right.
(Witness excused.)

127 JIM DOWNING, having been duly sworn upon behalf of the Government, was examined through an interpreter by the district attorney, Mr. W. H. H. Clayton, esq., and testified as follows, to wit:
Question. Ask him what is his name?
Answer. Jim Downing.
Q. Ask him if he was at the dance at Jim Rowe's on the night before Colvard was killed?
A. Yes, sir; he says he was there.
Q. What time did he get to the dance?
A. He says he got there a little before sundown or a little before dark.
Q. Did he see the defendant Hicks and Stand Rowe there?
A. Yes, sir.
Q. Were they armed?
A. Yes, sir.
Q. What did they have?
A. They had Winchesters.
Q. Did they each have a Winchester?
A. Yes, sir.
Q. Ask him if he saw Jack Colvard there?
A. Yes, sir.
Q. Ask him if he staid all night, the witness?
A. Yes, sir.
Q. Ask him if the next morning he saw Jack Colvard there?
A. Yes, sir.
Q. Did he see the defendant and Stand Rowe there?
A. Yes, sir.
Q. He saw all three of them there?
A. Yes, sir.
Q. Where did he last see Colvard before he was killed?
A. Near Jim Rowe's house.
Q. What part of the premises?
A. West of the house.
Q. On the inside or outside of the yard?

A. Outside of the yard fence.
Q. How close to the fence?
A. About 4 steps.
128 Q. Was he horseback or on foot?
A. Horseback.
Q. Now, ask him if he saw Colvard when he left?
A. Yes, sir.
Q. Ask him when he last saw Hicks before the shooting?
A. Near Jim Rowe's house there.
Q. Did he see him when he came to the house; I do not mean did he see him when he came there first the night before, but did he see him when he came back to the house just before Colvard left there?
A. Yes, sir; I saw him, he says.
Q. He saw him when he came?
A. Yes, sir.
Q. Which way did he go?
A. He came from the north.
Q. Was there anybody with him?
A. No, sir; he was alone.
Q. Was he a horseback or on foot?
A. He was a horseback.
Q. When he came back there what did he do?
A. He didn't do anything.
Q. Where did he go to, who did he see, and who did he speak to?
A. He and Jack Colvard had a conversation.
Q. Did he ride up to Jack Colvard?
A. Yes, sir.
Q. Was Jack Colvard around on the west side of the house yet?
A. Yes, sir.
Q. Now, then, did Hicks speak to anybody else, talk to anyone but Colvard?
A. No, sir.
Q. Did he got off his horse?
A. No, sir.
Q. Could he hear what was said?
A. Yes, sir.
Q. What did he say?
A. He said, "Let's go, Jack," he says.
Q. Did he say anything else?
A. That is all, he says.
Q. Then what did they do?
A. They started.
Q. Which way did they go; did they start together?
A. No, sir; they didn't go together.
129 Q. How did they go?
A. They both went in a west direction; but, then, they were some distance apart.
Q. Ask him if they went in the same trail.
A. No, sir.
Q. Ask him how many trails there were leading out to the road.
A. He says he could not say.

Q. Is there more than one?
A. Yes, sir; there were several trails, he says.
Q. Did the trails these men went on lead to the road?
A. Yes, sir.
Q. Now, he says they went the road up there; he went to Colvard and he didn't get off his horse, and he spoke to Colvard and said, "Let's go Jack." That is right, is it?
A. Yes, sir.
Q. And then they started off, both going in a west direction, on different trails, but both of these trails led to the road?
A. Yes, sir. [Witness is here shown diagram.]
Q. The road runs east and west, does it not?
A. Yes, sir.
Q. Now, he says that Mr. Colvard was standing west of the house on the outside of the fence?
A. Yes, sir.
Q. Ask him which way they went on this diagram when they left here.
A. He says that he does not understand this diagram.
Q. He says they both started off going in a west direction, in differ'nt trails, leading to the road?
A. Yes, sir.
Q. Did he hear the guns fire?
A. Yes, sir.
Q. About how long after they left?
A. About an hour afterwards.
Q. Ask him if he is any relation to Joe Downing?
A. Yes, sir; there are brothers.
Q. Where was Joe at the time that he saw Hicks ride up there and go to Colvard?
A. He was standing right by the fence, or near by.
130 Q. Was there anybody else out there?
A. No, sir.
Q. At the time when Hicks rode up and had this talk with Colvard was there anybody out there except him and Joe; and, if so, name them.
A. There was another man by the name of William Downing standing near by.
Q. Is he here?
A. No, sir; he is not here.
Q. Was there anybody else?
A. No, sir.
Q. Does he know Switch Foreman?
A. Yes, sir.
Q. Was he out there?
A. Yes, sir; he is here.
Q. Was he where they were outside there where this thing occurred, when it occurred, is what I asked him?
A. No, sir; he says he didn't see him.

Cross-examination by Mr. FREDERICK:

How close was he to John Hicks when John Hicks said, "Let's go," to Jack Colvard?
A. He says he was standing about 10 steps away.

Q. What was he doing?
A. He said he was standing about ten steps away.
Q. Was there anyone between him and John Hicks and Colvard?
A. No, sir.
Q. He says he and Joe were standing together, does he?
A. Joe was a little nearer to them than he was, but him and William was standing right together, he says.
Q. What was Joe doing?
A. Not anything.
Q. Was Jo' talking to anybody?
A. No, sir.
Q. Ask him if he had any drinks that night or morning.
A. No, sir.
131 Q. He hadn't got a drink—no whiskey, I mean?
A. No, sir.
Q. Did he see anybody drinking whiskey?
A. He didn't see any drinking.
Q. He didn't see any whiskey there that night or that morning?
A. No, sir.
Q. Ask him if he was awake that night all night.
A. Yes, sir; he was awake all night.
Q. In the house most of the time?
A. Yes, sir.
Q. Ask himm if John Hicks spoke to Colvard in English or Cherokee when he said, "Let's go, Jack."
A. He spoke in English.
Q. Ask him how he knows what he said then.
A. He says he could understand that much very well.
Q. Does he not understand what I am saying?
A. He says he do not understand you, but he can understand some sometimes.
Q. Let me ask him this question direct to him: Did you have a drink this morning?
A. He *w*says he does not understa*d*nd you.
Q. Don't you want a drink of whiskey now? Tell him to answer that without you interpreting it to him.
A. He*r* says he does not understa*d*nd it.
Q. O*x*, Jim, let's go out and get a drink of whiskey?
A. He says he does not understand that.

Redirect examination by the DISTRICT ATTORNEY:

He says he understands a little English, does he?
A. Yes, sir; sometimes; I understand that all right.
Q. He understood it when he said, "Let's go, Jack?"
A. Yes, sir.
Q. Then he understands some English, does he?
A. Yes, sir.
Q. Then*n*, if he said anything else in English there he did not
132 understand it?
A. No, sir; he didn't understand anything else, if he said any more.

Q. But he understood that much—"Let's go, Jack?"

A. Yes, sir.

Q. He knows that he rode right up to him and didn't speak to anybody else?

A. Yes, sir.

Q. Did Hicks, after speaking to Colvard, go right off, or stay there awhile?

A. He went right off.

(Witness excused.)

133 SAM BLUEBIRD, having been duly sworn upon behalf of the Government, was examined through an interpreter, by the district attorney, Mr. W. H. H. Clayton, esq., and testified as follows, to wit:

Question. Ask him if he talks English?

Answer. He says he does not.

Q. Ask him what his name is?

A. Sam Bluebird.

Q. Ask him if he was at the dance at Jim Rowe's on the night before Jack Colvard was killed?

A. Yes, sir.

Q. How long did he remain there?

A. He says he staid there until about 9 o'clock, he supposes.

Q. Did he see the defendant and Stand Rowe there?

A. Yes, sir.

Q. Where were they when he saw them?

A. They were outside, just around on the outside.

Q. Did they have any guns with them?

A. He didn't see any.

Q. Did he see any in the house?

A. No, sir.

Q. He didn't see the guns at all?

A. No, sir.

Q. Now, then, did he see Colvard when he came?

A. Yes, sir; I saw him in the house dancing, he says.

Q. What time was that?

A. It was about 9 o'clock.

Q. Ask him if he heard Hicks say anything about him to Rowe when Colvard came there; and if so, what was it?

A. He says he was standing off some distance from Stand Rowe and the defendant here, and they were around the fire——

Q. In the house?

A. Yes, sir; and somebody spoke up and said that Jack Colvard has come.

Q. Did he say somebody said that, or did he say who said it?

133½ A. No, sir; he says he does not know who said it.

Q. Tell him to go ahead.

A. He says that is all; he says he went out then and went home.

Q. What did the defendant and Rowe do when they learned he had come?

A. Stand Rowe stepped out, walked out of the house, and immediately after he went out, he says, he went out and went home.

Q. Where was Hicks?

A. I never noticed where he was when I left, he says.

Q. Now, ask him again who was it said that Colvard had come; who was it that made that remark?

A. He says he could not say who said that.

Q. Did he hear either one of these men say anything about his being there, or coming—either Hicks or Stand Rowe?

A. I could not say as to that; I don't know whether the defendant here said it or Rowe, or who, he says.

Q. He does not know whether it was the defendant or Rowe, or who?

A. No, sir.

Q. Ask him if it was either the defendant or Rowe?

A. He says he can not say; it may have been somebody else.

Q. Ask him if he did not say down in my office, when he was being examined there, and ask him what it is that has made him change his mind now?

A. He says, No, sir; I didn't tell you that.

Q. No, didn't tell me; but didn't he tell Mr. Fannin, my assistant that?

A. No, sir.

Q. Does he say he didn't say to Mr. Fannin that Hicks said to Stand Rowe, "Colvard has come," and then they both went out of the house together?

134 A. No, sir; he says he didn't tell him that; I just told him just as I tell it now.

Q. It must have been interpreted wrong, then. That is all. Tell him he can stand aside.

(Witness excused without cross-examination.)

135 JIM ROWE, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Your name is Jim Rowe?

Answer. Yes, sir.

Q. You are blind, are you not?

A. Yes, sir.

Q. Can you see at all?

A. No, sir; I can not see much. I can see a light.

Q. You are a brother to Stand Rowe?

A. Yes, sir; I a' his brother.

Q. It was at your house they had the dance, was it not?

A. Yes, sir.

Q. They had whiskey there, did they not?

A. Yes, sir; somebody had whiskey there.

Q. Do you know who it was?

A. No, sir; I could not tell you.

Q. You didn't try to find out much, I reckon?

A. No, sir; but I got a drink.

Q. Was your brother, Stand Rowe, there?

A. Yes, sir; he was down there.

Q. And John Hicks?

A. Yes, sir.
Q. I suppose you knew them by their voices?
A. Yes, sir.
Q. Did you know Jack Colvard?
A. Yes, sir.
Q. Was he there?
A. Yes, sir; he was there.
Q. Now, did you see Colvard any time during the night; did you hear him ask Hicks and Rowe to go home with him?
A. In the night?
136 Q. Or the next morning either?
A. No, sir; it was not in the night; it was just about daylight.
Q. Tell about that?
A. Colvard was asking Stand Rowe and John Hicks to go home with him, and Jack promised Stand Rowe—you know he had a store, and he told him he would give him a suit of clothes, boots, and a hat, and he would give him something to eat, feed their horses there at his house.
Q. Whose horses did he say he would feed?
A. Stand Rowe and his horse; I guess he meant the two.
Q. What reply did they make to him when he asked them to go with him?
A. Stand Rowe told him, "No, he didn't have time now." He said he would go back some other time, and Colvard didn't say anything when he said that; and after awhile they all kept talking, and I don't know what they were talking about, they were all talking; and Colvard was standing there and he was saying, "If you don't go home with me you don't know what I will do with you," and then turned off and laughed, and Stand he laughed; and about that time I heard John Hicks—his voice, you know—he was standing about three steps from where we were, and I went to John and I says, "John——"
Q. What did you hear him say?
A. He said, "Stand, let's go." Well, when I went to him I says, "John, you take Stand out of the crowd and you and him go home." And Hicks was still talking, and he said if Jack didn't quit begging us to go home with him, damned if I don't shoot him.
Q. That was Hicks said that?
A. Yes, sir. I said, "No, you must not do that; Jack is a good man."
Q. You said that to him?
A. Yes, sir; and Hicks, he laughed.
137 Q. Do you know whether Stand Rowe was on the scout?
A. Yes, sir; he was then, at that time.
Q. Did you know whether Hicks was?
A. That is what I heard, that he was on the scout; I didn't ask him myself.
Q. Now, then, I believe you say when you, had this talk you were out a little piece from the house?
A. No; we were just in the road, I think—I know it was; we were in the road.
Q. Had you gone off a little distance from the house?
A. Well, sir, I expect we were about—we may have been about 100 yards, or maybe not that far, from the house.

Q. What direction from the house?
A. Down the creek.
Q. In the direction of Murphy's house when that was said?
A. Yes, sir.
Q. This was in the morning that you had this talk?
A. Yes, sir; right just about daylight.
Q. Do you know what became of Colvard after that; did you see Colvard or have a talk with him?
A. Yes, sir; and when we left there we went back towards my house, up the creek, and went past our house, and we went a little over 100 yards, I guess, I do not know, I expect about 100 yards up the creek, up northeast.
Q. Up the road?
A. Yes, sir.
Q. We have been calling the road running east and west; it really runs northeast and southwest?
A. Yes, sir.
Q. So you were going up the road?
A. Yes, sir; we went up that way.
Q. You left that place, down southwest of the house, and then went on up the creek, northeast, by your house, passed your house, and up the road?
A. Yes, sir; that is right.
138 Q. About 100 yards?
A. Jack and Stand Mixwater was riding double, and Stand Mixwater was riding behind Jack Colvard——
Q. Is his name Stand Mixwater?
A. Yes, sir.
Q. What did you go up to that place for?
A. We went up that way, I think, to get a drink of whiskey or something.
Q. Do you know what occurred up there, or can you tell anything that occurred, or anything happened up there while you were there?
A. No, sir; we didn't get any drink.
Q. You got no drink?
A. No, sir.
Q. You remember that, do you?
A. Yes, sir.
Q. What became of the defendant and Stand Rowe; do you know?
A. Well, they went off there, I think; they said they went off; I could not tell you that; I could not see them.
Q. You understood while you were there they went off?
A. Yes, sir.
Q. Do you know what became of Colvard?
A. Him and Stand Mixwater went on up the creek a little piece, they say; I could not tell you that.
Q. You could not see that?
A. No, sir.
Q. You understood it right then and there?
A. Yes, sir; other parties told me they went up the creek there. That is all I can say. I didn't see it; and me and two more fellows that went back to my house, right down the creek.

Q. You and who?

A. Eli Batt. Before we got to our house Jack overtook us. I know when he overtook us, for I knew his voice, you know. When we got to the yard fence I told the boys, "Let's go and get over and go in the house and warm; it is cold." And Colvard said, "What must do;"

139 and I said, "Get down and hitch your horse and come in like you always do;" and he said, "All right," and that is the last of it. I didn't see him any more, or I didn't hear him talking any more.

Q. You never heard him talking any more, after that?

A. No, sir.

Q. You don't know how he got away from there?

A. No, sir; I don't know.

Q. How long was that, before the killing; did you hear the guns fire?

A. No, sir; I didn't hear them.

Q. How long was that, now, when you left Colvard there on the outside, told him to get down and come in like he always did—how long was that before the killing?

A. It wasn't long; I could not say how long it was; it wasn't very long.

Q. You learned of the killing, did you; who did you learn of the killing from; who told you about it first?

A. Switch Foreman, I think, came there and told the other boys, I think; and Bill Batt told us.

Q. When you left Colvard on the outside how long was that before you learned from Bill Batt that Colvard was killed?

A. It was pretty near a quarter of an hour, maybe.

Q. After you left Colvard on the outside did he come inside; could you hear his voice upon the inside any more?

A. No, sir.

Q. You could not hear his voice?

A. No, sir.

Q. After you went up the road, northeast, as you call it, when you understood that Hicks and your brother, Stand Rowe, left you, did you see them any more?

A. No, sir.

Q. That is the last you saw of them?

A. Yes, sir.

Q. If either one of them came back to your house you did not see them?

A. No, sir.

140 Q. Nor did they make any inquiries of you for ropes or anything else?

A. No, sir.

Cross-examination by Mr. C. J. FREDERICK:

You never heard John Hicks or your brother, Stand Rowe, after they left you there, when you went up there to take a drink, you never heard them any more; of course you did not see them at all, but you never heard them any more after you went up there to take a drink, above your house?

A. No, sir; I never heard them any more.

Q. You don't know whether they were back to your house or not?
A. No, sir.
Q. That was after daylight, was it not?
A. It was about good day.
Q. John Hicks and Colvard were fri'ndly, were they not?
A. I guess they were; I could not tell you.
Q. You don't know anything to the contrary, do you?
A. No, sir; I don't know anything about it.
Q. Were your brother and Stand and Colvard fri'ndly?
A. Yes, sir; they looked like they were friendly while they were all there at my house that night.
Q. Do you know why it was that Colvard wanted to give your brother a suit of clothes, a hat, boots, and feed for his horse, and all that sort of thing; how was that?
A. I guess they were good friends.
Q. That is an unusual way of friendship; people do not give you boots and clothes, do they?
A. Yes, sir.
141 Q. Jack never have you anything of that sort, did he?
A. Yes, sir; when I worked for him.
Q. Did he owe Stan'? Stand never worked for him—I mean Jack never worked for Stand, did he?
A. No, sir.
Q. He didn't owe Stand anything, did he?
A. I don't know anything about that.
Q. He just told him if he would go home with him he would give him a suit of clothes, a hat, a pair of boots, and give him something to eat; feed his horse. What did he want him to go home with him for?
A. I could not tell you?
Q. Did he tell Stand what he wanted him to go home with him for?
A. No, sir.
Q. Stand didn't want to go, did he?
A. No, sir; didn't want to go right then.
Q. Stand was keeping out of the way of the officers, then, at that time, was he not; he didn't want to be arrested?
A. Yes, sir; I guess so; he was on the scout. He never told me he tried to get out of the way.
Q. You were telling John Hicks to get Stand off, were you not?
A. Yes, sir.
Q. Why didn't you want him there; why did you want John Hicks to get Stand away?
A. I wanted John Hicks and Stand to go home.
Q. Why did you want to get them away from there?
A. Because they were all drinking.
Q. I suppose you thought probably the officers might come along and get Stand, didn't you?
A. Yes, sir.
142 Q. Jack Colvard's store was up at the Saline court-house, was it not?
A. Yes, sir.

Q. You didn't think it would a good place for Stand to go, did you, in the day time?

A. Yes, sir; that is what I thought.

Q. You mean you thought it was not a good place for him to go?

A. Yes, sir.

Q. Did Stand ask Jack why he wanted him to go home with him?

A. No, sir.

Q. What did Stand say to him when Jack would tell him he wanted him to go?

A. I said that Stand said he didn't want to go right then; he would go some other time and see him.

Q. Jack Colvard was no *a*kin to Stand, was he?

A. No, sir.

Q. Jack had been to your house a good many times, had he not?

A. Yes, sir.

Q. One of Stand's girls stand at your house, did she not, a right smart?

A. Yes, sir.

Q. What is her name?

A. Annie.

Q. Jack would go there to see her, would he not?

A. I do not know.

Q. You don't know?

A. No, sir.

Q. He was there a good many times while she was there, was he not?

A. Yes, sir.

Q. Was Annie at the house—at your house—that night?

A. Yes, sir.

Q. Annie is a single girl—not married?

A. Yes, sir.

Q. How old is Annie?

A. I could not hardly say; I don't know exactly. She is not over 20.

Q. Annie has got a baby since then, has she not?

A. Yes, sir.

Q. How long after that?

A. I could not tell you how long.

143 Q. A month or two or three?

A. I don't know; longer than that, I guess.

Q. Who is the father of the baby; she is not married, you say?

A. Well, I could not tell you.

Q. You don't know?

A. No, sir.

Q. You never heard anything about that; you never heard her say?

A. I never heard her say about who is the dad'y of it. I heard some other parties say who was its dad'y.

Q. What did they say?

A. They said it was Dave Rogers's baby.

Q. How many beaux did she have?

A. Just that one. She never told me anthing about it; I heard some other parties speak about it.

Q. You heard from some other parties it was Jack Colvard's, didn't you?

A. No, sir.

Q. You never heard it was Jack's?

A. No, sir.

Q. She staid at Jack's a part of the time, didn't she?

A. Yes, sir; she staid there a week once; Jack hired her to cook there. They were going to have court there, and he hir'd her to cook in that court. He hired two girls to stay at the same time. That was the May court.

Q. She staid up at Jack's about a week?

A. Yes, sir.

The DISTRICT ATTORNEY. Hired to cook?

Mr. FREDERICK. Yes, sir; hired to cook. (To the witness.) When you told John Hicks to get Stand away, you say John said if he didn't quit begging him to go—if Jack did not let Stand alone—he would shoot him?

A. Johnn Hicks said, "If Jack Colvard don't quit begging us to go home with him, damned if I don't shoot him.

Q. And then he laughed?

144 A. Yes, sir; John laughed, and I said, "No," and John laughed.

Q. The reason of that was, John wanted Jack Colvard to let him alone, so he could get him off like you wanted him too, and take Stand away?

A. I guess so.

Q. Certainly; that is the way you understood it at that time, was it not; you understood that John Hicks wanted to get Stand Rowe off; wasn't that your idea?

A. I guess it was; I could not saw that.

Q. That is what you *nwated* him to do?

A. Yes, sir; that is what I wanted him to do. I don't know what he wanted to do.

Q. You didn't want him to go with Jack Colvard; you wanted John Hicks to take him off, didn't you; wanted him to take your brother, Stand Rowe, off?

A. Yes, sir.

Q. You and John Hicks were friendly, were you?

A. Yes, sir; me and John are good friends. We never have fell out yet.

Q. How long have you known John Hicks?

A. I have known him about 20 years.

Q. How long did you know Jack Colvard?

A. About ten years, when I got acquainted with him; I seen him longer than that.

Q. You seen Jack Colvard longer than that?

A. Yes, sir.

Q. How long have you been blind?

A. Growing on 9 years.

Redirect examination:

The DISTRICT ATTORNEY. Your brother got killed, did he not?

A. Yes, sir.

Q. By the marshals trying to arrest him?

A. Yes, sir.

(Witness excused.)

145 JOHN M. TAYLOR, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to-wit:

Question. State your name, please.
Answer. John M. Taylor.
Q. Where do you reside?
A. Tahlequah, Cherokee Nation.
Q. Did you know Andrew J. Colvard in his lifetime?
A. Yes, sir.
Q. What was his name?
A. Andrew J. Colvard.
Q. How long have you known him?
A. I have known him ever since he was a boy, in North Carolina.
Q. Did you know him in North Carolina?
A. Yes, sir; he was quite a boy then.
Q. You are a Cherokee, are you not?
A. Yes, sir.
Q. You came from North Carolina with the Cherokees?
A. Yes, sir.
Q. You knew him there?
A. Yes, sir.
Q. Was he a white man or an Indian?
A. He was a white man.
Q. White parents?
A. Yes, sir.
Q. Father and mother?
A. Yes, sir.
Q. Did you know his wife?
A. Yes, sir.
Q. What was she?
A. She was a part Cherokee.
Q. By her father or mother?
A. Her mother.
Q. Was her father a white man?
A. Yes, sir.
Q. Do you know where they were married?
A. No, sir; I do not.
Q. Do you know whether they were married before they came to the Indian country?
A. No, sir.
146 Q. You never learned from them where they were married?
A. No, sir.
Q. You never learned whether they were married before they came to the Indian country or not?
A. No, sir; I suppose they were.
Mr. FREDERICK (of counsel for defense). Do not suppose.
The DISTRICT ATTORNEY. Did you see them shortly after they came?
A. They came to my house when they first came.
Q. When they first came to the Cherokee Nation they came to your house?
A. Yes, sir.

Q. Did they come as man and wife?
A. Yes, sir.
Q. When was it that they came?
A. They came in June, 1893.
Q. What is your business in the Cherokee Nation?
A. I am not'ing particular; I am no man of labor; I practice law.
Q. You practice law in the Cherokee Nation?
A. Yes, sir.
Q. In the courts of the Cherokee Nation?
A. Yes, sir.
Q. Did they come into the Cherokee Nation before or after the expiration of the statute admitting North Carolina Cherokees?
A. I think it was after.
Q. After the limitation?
A. Yes, sir.
Q. Do you know when the limitation ended?
A. I think it ended in 1881.
Q. I will ask you whether, if you know, Colvard was ever recognized by the authorities as a Cherokee?
A. No, sir; he was not.
Q. This Colvard I speak of is Andrew J. Colvard, the man who was killed by Stand Rowe?
A. Yes, sir.
Q. He was not recognized as a Cherokee citizen?
147 A. No, sir; he was not recognized.
Q. Do you know anything else about his citizenship and his rights other than you have stated now?
A. No, sir.
Q. When did you leave North Carolina?
A. I came—I was there in 1872 last.
Q. Do you hold rights as a citizen in the Cherokee Nation?
A. Yes, sir; I have been in the Cherokee Nation ever since 1857.
Q. You did not go in under that statute, the statute that ended in 1881?
A. No, sir.
Q. You came in as an original Cherokee?
A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

Have you not been talking with John Hicks as an attorney for him in this case?
A. No, sir.
Q. With his brother-in-law, then?
A. No, sir.
Q. Haven't they had some conversation about employment?
A. I had some talk with you in regard to your fees, I believe.
Q. You didn't have any talk with Wofford about it?
A. No, sir.
Q. You talked with me about it?
A. I talked about your fees.
Q. We didn't get them, did we?

A. I don't think we did—or I didn't. I was not connected with the case in any way.

Q. Have you not been advising with me about the case, as to this citizenship proposition?

A. No, sir; you asked me some questions in regard to it.

Q. Several times, haven't I?

A. Yes, sir.

Q. Now, you say that Jack Colvard was never recognized as a
148 Cherokee citizen?

A. He does not appear upon the authenticated rolls as a Cherokee citizen.

Q. How do you know?

A. The chief looked over the record when I was up there last.

Q. What were you doing that for?

A. The question came up in regard to the matter.

Q. Do you not know that Jack Colvard was a merchant up there in that country?

A. No, sir; I do not.

Q. Do you not know that he obtained license as a Cherokee citizen to sell goods, and sold goods there, as a merchant?

A. I do not.

Q. Did you look over the records to find that?

A. No, sir; he lived in Saline district, and I lived in Tahlequah district, and I don't know anything about his business affairs.

Q. You are a Cherokee lawyer?

A. Yes, sir.

Q. Do you not know that no one but a Cherokee citizen can obtain license to sell goods in that country?

A. That is the law, but there are a good many who do sell goods without license.

Q. I am speaking about getting license?

A. I don't know that Colvard ever got any license.

Q. I asked you if that was not the law, that none but a Cherokee citizen could obtain license to sell goods?

A. Yes, sir; that is the law.

Q. You don't know whether Jack Colvard obtained license or not?

A. No, sir.

Q. You don't know whether he carried on business or not?

A. No, sir; he carried on his business some 30 miles above me; I never was at his place of business.

149 Q. Did you know J. E. Whittaker, and do you know him now?

A. I know W. T. Whittaker.

Q. You know W. T. Whittaker?

A. Yes, sir.

Q. Where does he live?

A. At Pryor Creek.

Q. What district is that?

A. Coo-wee-scoo-we district.

Q. Is he a white man?

A. He is part Cherokee.

Q. Do you know whether or not he held any office in May, 1890?

The DISTRICT ATTORNEY. I object to that until I find out the relevancy of it.

The WITNESS. I don't know that he did.

Mr. FREDERICK (of counsel for defense). You don't know much about him.

A. No, sir; he lives in the Coo-wee-scoo-wee district, and that is about 40 miles from where I live.

Q. You live in the Tahlequah district?

A. Yes, sir.

Q. Do you know J. E. Whittaker?

A. No, sir.

Q. You do not know the Whittaker who was a partner with A. J. Colvard?

A. That was W. T. Whittaker, who lives at Pryor Creek; W. T. Whittaker lives at Pryor Creek.

Q. You do you know anything about J. E. Whittaker, then?

A. Not by those initials.

Q. The reason you can say that he was never recognized as a Cherokee citizen is because you do not know that he was; is that it?

A. I don't know that he was.

Q. He was in a different district from you?

A. Yes, sir.

Q. You do not know whether he ever participated in the distribution of Cherokee funds or payments?

A. No, sir.

Q. You do not know that?

A. No, sir.

150 Q. You do not know that?

A. No, sir.

Q. You don't know whether he was married, or whether he was married at all?

A. He didn't marry under the Cherokee laws; I don't know anything about how he was married.

Q. How do you know?

A. There is no record of it.

Q. You do not know of your own knowledge; you did not investigate the record?

A. I was there when his wife made application for citizenship, and he was left off because he was a white man.

Q. When was that?

A. That was in 1883.

Q. That is about the time they came here?

A. Yes, sir; the fall they came here.

Q. You do not know what he has done since then?

A. No, sir.

Q. Therefore you can not say, then, that he was not recognized as a Cherokee citizen, can you?

A. He wasn't recognized as a citizen.

Q. As far as you know?

A. Yes, sir.

Q. Do you mean to say you did not recognize him as a citizen, is that it?

A. I say he does not appear upon the authenticated rolls as a Cherokee citizen.

Q. You did not investigate that?

A. The chief did.

Q. You just got that from hearsay; you do not know; you think that statute which made North Carolina Cherokees citizens, which admitted them, ended in 1881?

A. I think it was.

Q. You don't know whether it was ever extended or not?

A. No, sir.

Q. You are speaking of course from memory. Have you investigated the question lately?

A. No, sir.

Q. You mean by that that the statute expired by limitation?

A. Yes, sir.

151 Q. When was that statute passed?

A. Passed in 1880.

Q. And just run one year?

A. I think so. Delegates were sent to give them invitations, and they reported to the next council in May, 1881.

Q. Didn't Jack Colvard come under that invitation?

A. I do not know that he did.

Q. Don't you know from having heard him and his wife both say that they came upon that invitation?

A. I don't know that I did.

Q. Didn't you tell me so the other day, and they were delayed in coming here?

A. I don't know anything about the delay.

Q. You speak Cherokee, do you not?

A. No, sir.

Q. You can not speak the Cherokee language?

A. No, sir.

Q. Jack Colvard did, did he not?

A. Yes, sir.

Q. Jack's father did, did he not?

A. Yes, sir.

Q. You say you knew Jack when he was a little boy; he was among the Cherokees in North Carolina, was he not?

A. Yes, sir.

Q. His father lived right there among them?

A. Yes, sir.

Q. But you have already stated to Judge Clayton that both of his parents were white people?

A. Yes, sir.

Q. How do you know?

A. My father bought Andrew Colvard's place in Cherokee County; he was living with an Indian woman, Lucy Hawkins, and after that he lived with a Cherokee woman, and then after that he married Miss King, a white woman.

Q. Whose father?
A. Jack Colvard's father.
The DISTRICT ATTORNEY. He was married three times; twice to a Cherokee woman and then to a white woman?
A. Yes, sir.
The COURT. Which was the defendant Colvard's mother?
152 The WITNESS. The white lady.
Q. The last wife?
A. Yes, sir.
Q. He was a white man, was he?
A. Yes, sir.
Q. That was in North Carolina?
Yes, sir; in Cherokee County, North Carolina.
Mr. FREDERICK (of counsel for defense). How did he come to come to the Cherokee Nation?
A. I don't know, sir. His wife is part Cherokee.
Q. Did he not come and claim a right as a Cherokee citizen?
A. I do not know that he did.
Q. Did you ever hear him say so?
A. No, sir; I never heard him say so.
Q. He just came out and squatted down and never said a word?
A. He came up to the Tahlequah district first, and his wife and two children were admitted, and he moved them to Delaware district.
Q. Jack Colvard's wife is a neice to you?
A. Yes, sir.
Q. John Hicks is no kin to you?
A. None that I know of.

Redirect examination by the DISTRICT ATTORNEY:

Colvard's wife was your neice?
A. Yes, sir.
Q. That is the way you state it?
A. Yes, sir.
Q. Was Colvard's father married to these two Cherokees, or just living with them?
A. The old fashion—just living with them.
Q. Took up with them?
A. Yes, sir.
Q. Did they die, or did he just get tired of them?
A. The first one died.
153 Q. The second one he left to marry the mother of Colvard?
A. Yes, sir.
Q. That is how he come to be a Cherokee, or come to speak the language; he was with them?
A. Yes, sir.
Q. You say that Jack's name was not on the rolls, was left off the rolls; you were present in 1883 when his wife applied?
A. Yes, sir; made application before the court there.
Q. When was that; in 1883?
A. Yes, sir.
Q. And she was put on the rolls as a citizen?

A. Yes, sir; her and her two children by Jack.

Q. And Colvard being a white man, and not married under their laws, was left off?

A. Yes, sir.

Q. Is that the way of it?

A. Yes, sir.

(Witness excused.)

154 JOHN INGRAM, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Your name is John Ingram?

Answer. Yes, sir.

Q. What is your father's name?

A. Eli.

Q. Where do you live?

A. I live about 9 miles northwest of Tahlequah.

Q. Are you an Indian?

A. Yes, sir.

Q. Cherokee Indian?

A. Yes, sir.

Q. Did you know Andrew J. Colvard in his lifetime?

A. Yes, sir.

Q. What was his name, as you understood it?

A. His name was Jack Colvert. I never did hear him called Andrew until I came down here.

The COURT. What did you name him in the indictment?

The DISTRICT ATTORNEY. Andrew J. Colvard. There is a witness here who was his partner who states it was Colvard.

Q. You knew him?

A. Yes, sir.

Q. Was he a white man or an Indian?

A. He was a white man.

Q. His wife was an Indian, was she not?

A. Yes, sir; she was an Indian.

Q. That is, she was admitted as a citizen?

A. Yes, sir.

Mr. FREDERICK (of counsel for defense). He has not said that.

The DISTRICT ATTORNEY. The other man did.

Mr. FREDERICK (of counsel for defense). What the other man testified is not what this man testifies to.

The DISTRICT ATTORNEY. Did you know his wife?

A. Yes, sir.

155 Q. Is she a citizen by blood?

A. She is a citizen by blood.

Q. Do you know anything about Colvard's marriage, whether he was married according to the laws of the Nation or not? Did you ever hear him say, him or his wife, that he was ever married according to the laws of the Cherokee Nation?

A. I never did hear of it. I do not think that he ever was.

Q. Do you know where they were married?

A. No, sir; I do not know anything about it.
Q. When did you come to the Cherokee Nation?
A. In 1881.
Q. When did your father come?
A. In 1881.
Q. Did you know Colvard back in North Carolina?
A. Yes, sir.
Q. You knew him back in the old country;
A. Yes, sir.
Q. Was he married when you left?
A. Yes, sir; he was married when I left.
Q. To this woman?
A. Yes, sir.
Q. Then you know that he was not married in the Indian country? I asked you if he was married in the Indian country, or if you knew where he was married?
A. I know that he was living with this woman, but I don't know anything about his marriage.
Q. He was living with her as his wife?
A. Yes, sir.
Q. In North Carolina?
A. Yes, sir; but I was not present at the marriage.
Q. You do not have to be present; you know they were living together as man and wife?
A. Yes, sir.
Q. And that was before they moved to the Cherokee Nation?
A. Yes, sir.
Q. Did they have any children before they came?
A. Yes, sir; they had some children.
156 Q. How old were the children at the time you left there in 1881?
A. I don't know; I was quite young myself, and I could not tell you.
Q. Your father is here?
A. Yes, sir.
Q. You know they lived together there as man and wife?
A. Yes, sir.
Q. Did you ever hear Colvard say anything about it after he came into the Nation? Did you ever speak to him about marrying according to the laws of the Nation, anything of that kind?
A. No, sir; I do not remember that I ever did.
Q. This is all you know about it, is it? You know they lived together there as man and wife and had children in North Carolina?
A. Yes, sir.
Q. How long after you came into the Cherokee Nation was it they came, or when did they come, if you know?
A. Well, I do not remember whether they came in 1882 or 1883.
Q. It was either in 1882 or 1883?
A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

Q. How old are you?
A. Wel', sir, I am 23 years old.

Q. Are you a Cherokee by blood?
A. Yes, sir.
Q. Are you any akin to Jack Colvard's wife?
A. Yes, sir.
Q. What?
A. She was my mother's sister.
Q. She is an aunt of yours, then?
A. Yes, sir.
Q. She was a Cherokee by blood?
A. Yes, sir.
Q. Do you speak the Cherokee language?
A. No, sir.
157 Q. Does your mother?
A. No, sir.
Q. Does Jack's wife?
A. No, sir.
Q. Jack Colvard did?
A. Yes, sir.
Q. You came out to the Cherokee Nation, when?
A. In 1881.
Q. How long after you came until Jack came?
A. Well, I do not remember just exactly how long it was; he came in 1882 or 3, and I forget which.
Q. That is, he came the year after you came?
A. I won't be positive about that.
Q. Think about that a little bit.
A. He either come in 1883 or 1882, one, and I don't know which; I don't remember.
Q. What time in 1881 did you al' come?
A. I believe we got to Tahlequah the 25th day of November, 1881, as well as I remember.
Q. Now, Jack came the next year, did he not, after that?
A. Yes, sir; the next year or the year after that.
Q. Then you were about 11 years old when you came here?
A. Yes, sir.
Q. How did you all happen to come? What did you all leave the State of North Carolina and come to the Cherokee Nation for?
A. Well, sir, I will tell you; one thing that caused us to come, Uncle Jim Taylor was out here, and he came there and he told my father that the Cherokee Nation was a much better country than that, and that we had a right there and we ought to go and enjoy it.
Q. Did he tell Jack Colvard that?
A. I don't know anything about what he told him.
Q. You were a boy at that time?
A. Yes, sir.
Q. This blind man, John Taylor, is also your uncle, is he not?
A. He is my mother's uncle.
158 Q. Jim Taylor was your uncle?
A. No, sir.
Q. Your mother's uncle?
A. Yes, sir.

Q. They are brothers?
A. Yes, sir.
Q. What was Jack Colvard doing; what business was he following when he was killed?
A. Well, I don't think that he was following any business at all at the time that he was killed.
Q. What had he been doing before that?
A. He had been selling goods.
Q. Where at?
A. At Saline court-house.
Q. How was he selling them; under what right was he selling them?
A. I don't know anything about that. All I know is that he was there selling goods.
Q. How long did he sell goods up there?
A. Well, I do not know that.
Q. Several years?
A. I guess it was something over a year; it might have been two years; I do not know.
Q. Did he sell goods anywhere else; did he have a store some other place, too?
A. Not that I know of; he peddled awhile before he went into the business.
Q. Do you know J. E. Whittaker?
A. I know a Mr. Whittaker.
Q. You know W. T.?
A. Yes, sir.
Q. Do you know J. E.; how many Whittakers do you know?
A. I know several.
Q. There is one of the Whittakers here, is there not?
A. Yes, sir.
Q. Which one is that?
A. W. T.; J. T. Whittaker, I don't know that I know him.
159 Q. Did Jack Colvard have any partner in the store at Saline court-house?
A. I have understood that he did.
Q. Who?
A. W. T. Whittaker.
Q. What name was the store run in?
A. I don't know that.
Q. Was it not A. J. Colvard & Co.?
A. I don't know whether it was or not. I never did see his license that he had, if he had any at all.
Q. You never saw his license, if he had any?
A. No, sir.
Q. You say W. T. Whittaker is here?
A. Yes, sir.
Q. You do not know how long he run the store?
A. No, sir.
Q. Have you been living in the neighborhood of Jack Colvard mostly since he has been living in the Cherokee Nation?
A. When he first came out here he lived right close to where we did for awhile.

Q. Then where did he go?
A. I don't really remember where he did move to at first.
Q. You live in the Saline district, do you?
A. No, sir.
Q. What district do you live in?
A. Tahlequah district.
Q. Jack's store was in Saline district, was it not?
A. Yes, sir.
Q. He lived in Coo-wee-scoo-wee district awhile, did he not?
A. Yes sir; he lived there awhile.
Q. He lived at Pryor Creek?
A. Yes, sir.
Q. Run a store up there, did he not?
A. If he did I never heard of it.
Q. Was he ever an officer up there in the Cherokee Nation?
A. Not that I know of; I do not know that he was an officer.
Q. Did you ever hear him say that he was an officer?
A. No, sir; I never heard him say.
160 Q. You never heard that he was an officer from anybody, did you?
A. Yes, sir.
Q. You have heard that?
A. I don't know that he was.
Q. You do not know that he was a white man, either?
A. Yes, sir; I think he was a white man.
Q. How do you know it?
A. By looking at him. He never did claim to be anything else.
Q. You do not claim to be anything else, do you?
A. Yes, sir; I claim to be a Cherokee.
Q. There are a good many white men who are Cherokee citizens up there, are they not? And a man can be a Cherokee citizen without being an Indian, can he not?
A. I should not think that he could.
Q. Tha' is your idea about it; you do not know?

Redirect examination:

The DISTRICT ATTORNEY. You say that he never claimed to be anything else but a white man. Did you ever hear him talk abo't it?
A. Yes, sir; I have heard him talk about it, about being a white man.
Q. Did you ever have any talk with him with regard to marrying, and marrying under the laws of the Nation, and becoming a citizen?
A. No, sir.
Q. Did you ever hear anybody talk to him?
A. No, sir.

Recross-examination:

Mr. FREDERICK. You never heard him talk about the citizenship matter one way or another, did you?
A. No, sir.
(Witness excused.)

161 ELI INGRAM, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. Are you a citizen of the Cherokee Nation?

Answer. Yes, sir.

Q. Did you know Colvard in his lifetime?

A. Yes, sir.

Q. What was his name?

A. His name was A. J. Colvard. We always called him Jack.

Q. Did you call him Colvard or Colvert?

A. Colvert is what we called him; that is the way they spell their name.

The COURT. Is that the way you have it in the indictment?

The DISTRICT ATTORNEY. We have it "d" instead of a "t."

Q. Did you know him in North Carolina?

A. Yes, sir.

Q. Was he a white man or an Indian?

A. He was a white man.

Q. Where was he married?

A. He was married back in North Carolina.

Q. Do you know when?

A. I do not recollect when.

Q. Before he moved to the Cherokee Nation?

A. Yes, sir.

Q. About what time?

A. He moved to the Cherokee Nation in 1883. He had been married some four or five years previous to that.

Q. Had he any children when he moved to the Nation?

A. Yes, sir.

Q. Do you know how many?

A. There was a couple of them.

Q. What time in 1883 did he move there into this country?

A. He came there in about June. He come to my house when

162 I commenced oat harvest; I recollect that; him and his family.

Q. He had two children, then?

A. Yes, sir.

Q. He was married in North Carolina, and had two children when he moved there?

A. Yes, sir; when he came to my house he had two children.

Q. Do you know whether he was a citizen of the Cherokee Nation or not?

A. No, sir.

Q. Did you ever hear him talk about it?

A. Yes, sir.

Q. What talk with him did you have about it?

A. It was understood that all white men that were married back there had to be remarried here, or had to be recognized by the Cherokee council as man and wife here, and Colvard told me that he would not marry the same woman over the second time to become a citizen. He said if it required that, that he would not do that.

Q. He told you that?

A. Yes, sir; I and him talked the matter over, and that is what he told me.

Q. When did you have this talk with him; do you remember?

A. I do not recollect; at a certain time along, and all along after he came here; and along the talk would come up that all white persons that come here to become citizens from back there, all Cherokees that married back there, would have to be remarried here.

Q. You talked frequently about it?

A. Yes, sir.

Q. You know that he did not remarry?

A. No, sir; not to my knowledge, he did not; he told me that he never would marry, and if he did I never heard of it.

Q. He told you he would not, and he spoke about it frequently, and you never heard of any remarriage?

A. No, sir; I never did.

Q. What relation were you to his wife?

A. We married sisters.

163 Q. You are a brother-in-law, then, of his?

A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

Q. Are you a citizen?

A. Yes, sir.

Q. How did you become a citizen?

A. I become a citizen; I come here under the invitation. There was a commission sent there and gave us the invitation, and I accepted of it, and on my arrival here, in 1881, the council was in session, and there was several of us white families come together at that time; and that council passed a special act accepting *us* from the proof that was made, as legal families; and then I took the oath.

Q. You never remarried any more?

A. No, sir; I never remarried at all.

Q. You were married in North Carolina?

A. Yes, sir.

Q. You lived among the Cherokees in North Carolina?

A. Yes, sir.

Q. Just as Jack did?

A. Yes, sir; more or less.

Q. You came in 1881?

A. Yes, sir.

Q. When did Jack come?

A. Jack Colvard come to my house in June, 1883.

Q. Why didn't Jack come along with you?

A. I don't know; he was not ready.

Q. He was not ready?

A. No, sir.

Q. Jack came under the same invitation, did he not?

A. I do not know that he did; it seems to me that the invitation gave out before that time; I think it had expired before Jack come here.

164 Q. Didn't Jack claim to be a citizen, as much so as you, because his wife was a citizen?

A. No, sir; he never did.

Q. He told you that he was not going to marry any more—would not remarry.

A. Yes, sir; he said if it took that to make a citizen he would never do it.

Q. You never had remarried?

A. No, sir.

Q. Did he not claim that he ought to be as much of a citizen as you?

A. I was admitted, as I said a minute ago, by a special act of the council.

Q. You came under that invitation to, from the council?

A. Yes, sir.

Q. You came under that invitation, and that invitation was that all those persons who lived back in North Carolina, those Cherokees and those who married Cherokees, by coming to the Cherokee Nation, would be recognized as citizens?

A. No, sir; it took something else. The invitation was only issued to North Carolina Cherokees, as there had been a dispute as to whether they would be welcome on their arrival here, and this commission was made and sent back there in order to show these parties that remained back there that they would be welcome on their arrival and welcome to become citizens.

The DISTRICT ATTORNEY. They were required to take the oath after they come here?

A. Yes, sir; certainly. I took the oath.

Mr. FREDERICK (of counsel for defense). Didn't Jack take the oath?

A. Not that I know of.

Q. How did he get license to sell goods?

A. I don't know anything about his license to sell goods.

Q. He did sell goods in his own name?

165 A. He was peddling about there.

Q. He had a store?

A. I never was in his store.

Q. You do not know about his having a store?

A. I do not know about it. I know that he was handling some goods; peddling about there.

Q. Well, will you say that he did not have a store?

A. I won't say that he didn't have a store. Of course, I know that he had a store; was running a store there——

Q. How long had he been running the store?

I could not tell. Him and W. T. Whittaker—I had understood that he was doing business under W. T. Whittaker—that him and W. T. Whittaker was doing business in copartnership some way or another.

Q. Is W. T. Whittaker a citizen?

A. Yes, sir; he is an Indian.

Q. He is a citizen?

A. Yes, sir.

Q. It does not take an Indian to be a citizen up there, does it?

A. Not every time; no, sir.

Q. But Whittaker is an Indian by blood, and you are a white man?

A. Yes, sir; that is right.

Q. Didn't understand they *they* did business under the name of A. J. Colvard & Co.?

A. I never did; I wasn't up there; I don't know how that was.

Q. Do you know about Jack holding office up there?

A. No, sir.

Q. You don't know about that?

A. No, sir.

Q. Where has Jack been living when he has been in the Cherokee Nation?

A. He has been living in the Saline district part of the time and——

Q. You have not been living very close neighbors?

A. No, sir; he has been to my house, of course, frequently, at different times.

Q. Mr. W. T. Whittaker is here?

A. Yes, sir.

(Witness excused.)

166 WILLIAM T. WHITTAKER, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. William T. Whittaker is your name, is it not?

Answer. Yes, sir.

Q. Did you know Andrew J. Colvard in his lifetime?

A. Yes, sir.

Q. The man who was killed by Stand Rowe?

A. Yes, sir.

Q. What was his name?

A. His name was A. J. Colvard.

Q. That is the way it is in the indictment. Where did you know him?

A. I knew him in North Carolina; and then I knew him in this country.

Q. Was he a white man or an Indian?

A. He was a white man.

Q. You knew him in North Carolina and the Cherokee Nation?

A. Yes, sir.

Q. Was he a citizen of the Cherokee Nation?

A. No, sir; he was not.

Q. How do you know?

A. I know, because he did not marry under the law.

Q. Now, then, go on and tell how you know that; that he never married under the laws of the Cherokee Nation. Have you ever had *a* any conversation with him since the death of his wife? His wife is dead, is she not?

A. Yes, sir.

Q. When did she die?

A. To the best of my recollection, it was sometime in 1890.

Q. He was killed in 1892?

A. Yes, sir.

167 Q. That would be about two years before his death?

A. Yes, sir; I think she died in August, 1890, as well as I remember.

Q. Did you and he have some business transactions there together?

A. Yes, sir; me and him and my wife, together.

Q. What transactions did you have there?

A. We furnished Mr. Colvard goods; I won't be positive on dates, but I believe it was in the spring of 1890, that we made a trade with Mr. Colvard and furnished him goods, and he run the business and was to give us half of the profits.

Q. Now, did he have any license?

A. Yes, sir; we got a license; the license was to A. J. Colvard and Company.

Q. How could he get license if he was not a citizen?

A. I don't know; the license was issued.

Q. Did you have any talk with him afterwards about that, as to whether he was a citizen or not?

A. Not until after his wife died. I sold out to Colvard—we sold to him—I believe it was in the fall of 1890, the best I remember, along in September or October——

Q. That was after the death of his wife?

A. Yes, sir.

Q. You sold out your interest?

A. Yes, sir; sold out to Mr. Colvard, and taken his note for $4,150.00, and then, after that sometime, Mr. Colvard came to me and said that somebody was talking about stopping him, and I asked him why, and he said because that he never married under the law, and I said to him: "The best thing you can do is to put the business in your children's name and go on with it," and he said "No," that he thought not, and he said he would like to sell it back to me, and we bought it back.

168 The COURT. Q. Your wife was an Indian?

A. No, sir; my wife was a citizen; she is a white woman and a citizen of the Cherokee Nation. My wife and T. W. Ragwell's wife bought it back.

The DISTRICT ATTORNEY. Because he was not a citizen?

A. Yes, sir; that is what he claimed; that he was afraid that they might—he said that he was afraid it wouldn't be all right, and it might cause trouble to me and my wife.

Q. In that conversation he told you that he had never married?

A. Yes, sir; he said he had never married under the law. I tried to get him to put it in his children's name and go on with it. I told him he could do it that way very well, because the citizens were admitted citizens, were drawing their money there, and he said he would rather just let it go back.

Q. So he sold out on that account?

A. Yes, sir; what he said is all I know; what he said.

Q. You sold out to him, you and your wife, in the fall of 1890, after the death of his wife?

A. Yes, sir; to the best of my recollection.

Q. When was it that he came to you and told you that the people were trying to raise some trouble?

A. It was in 1891 sometime, as well as I remember. I think it was in the fall. I think he ran the business there sometime, something near a year, and maybe a little over a year.

Cross-examination by Mr. C. J. FREDERICK:

169 He obtained license to trade as a citizen, did he not?

A. Yes, sir.

Q. You were the deputy clerk of the Coo-wee-scoo-wee district at that time?

A. Yes, sir; I was deputy clerk.

Q. Who was his partner—J. E. Whittaker?

A. No, sir.

Q. Who was J. E. Whittaker?

A. It is S. L. Whittaker.

Q. Who was J. E. Whittaker?

A. I don't know anything about J. E. Whittaker. If there is a J. E. Whittaker in that paper it is a mistake.

Q. Who made the affidavit before you?

A. Mr. Colvard.

Q. You do not know who J. E. Whittaker is?

A. No, sir; I do not know any such name.

The DISTRICT ATTORNEY. That may be a mistake in the copy. (Witness is here handed a copy of a paper.)

The WITNESS. That must be a mistake; it ought to be S. L. Whittaker.

Mr. FREDERICK (of counsel for defense). Was she a partner with Colvard?

A. Yes, sir; she was the company, my wife. We both furnished goods, but we had the company there to keep it from being mixed with my business. I had a business at Pryor Creek, and I was doing business as W. T. Whittaker.

Q. And he took out license as J. E. Whittaker and Company, and you and your wife were the company?

A. Yes, sir; simply had her name there, to not interfere with our own business at home.

The DISTRICT ATTORNEY. It ought to have been your wife's name there?

A. Yes, sir; S. L. Whittaker.

Mr. FREDERICK (of counsel for defense). He had to take an oath as a Cherokee citizen before he got the license?

A. Yes, sir.

Q. Who issues the license?

A. They are issued at Tahlequah.

170 Q. By the treasurer?

A. I suppose; yes, sir. Yes, that is the way it is; the treasurer issues it.

Q. Now, how long did he run the business?

A. Well, I do not remember the exact time, exactly how long, but it was some time in the fall of 1890, to the best of my recollection; I could have got it exactly by getting my books.

Q. This purports to be issued the first day of May, 1890?

A. That is when the license were issued. We first run a peddling wagon; Colvard run it the same way; we furnished him goods.

Q. Was that before he took out license?

A. Yes, sir.

Q. When he took out these license——

A. Then he located that place, and he said he believed we could do a good business there, if we would furnish him goods, and he would go ahead and do busines there, and we built a house there, and furnished him goods.

Q. This is dated the first of May——

A. That is about the time we started business. He run the business after we sold out to him. He run the business in his own name.

Q. Were you and Colvard any kin to each other?

A. No, sir; we were not any kin ourselves, only by marriage. He married my sister.

Q. Colvard's wife was your sister?

A. Yes, sir.

Q. Was he running this store at the time of his death?

A. No, sir.

Q. Who was running the store?

A. My wife and Ragdale's wife.

Q. Jack was having nothing to do with it then?

A. No, sir.

Q. How long had Jack been out of the business when he was killed?

A. I think about three months, probably; three or four months; somewhere along there.

171 Q. Was the business still conducted in the name of A. J. Colvard & Co.?

A. No, sir; it was run as S. L. Whittaker and R. Ragdale.

Q. Do you know whether Jack ever held any officer up there or not?

A. He never did that I know of.

Q. He was a deputy sheriff at one time, was he not?

A. I never heard of it.

Q. Do you know whether, too, he participated in the payments made to the Cherokees?

A. I think he drawed the money there for his children one time.

Q. And for himself?

A. No, sir.

Q. Of course his children could draw——

A. Yes, sir; but he never drew anything for himself.

Q. The Grass payment was the last that was made?

A. Yes, sir.

Q. Did he not draw in that payment for himself?

A. No, sir; not for himself; he drew for his children. I think that was in the fall of 1890; that was about the time I sold out to him, when that money was paid.

Q. You are a Cherokee by blood?

A. Yes, sir.

Q. His wife was a full sister of yours?

A. Yes, sir.

Q. How long have you been in the Cherokee Nation?

A. I come in 1881. I first come to this country in 1871; I proved my right here in 1871.

Q. When did Jack Colvard come?

A. I am not right sure; I believe, though, he came here in 1883; I think it was.

Q. Do you know why he happened to come here; why he come?

A. I don't know; I suppose because his wife had a right here. He left that country, I think, in 1880, probably, or 1881, and he stopped in Illinois; stopped there for some time.

172 Q. When he left there in 1880 he left with the view of coming to the Cherokee Nation, did he not?

A. I think he did.

Q. And stopped in Illinois?

A. Yes, sir; I don't know; I don' remember how long he stayed there, but anyway he stopped there; and he came into this country in 1883.

Q. The Cherokee authorities sent an invitation to the North Carolina Cherokees to come out; when was that, in 1881?

A. I do not remember the date of it.

Q. I think the commission was appointed in 1880, in November?

A. I came here in 1880, and there was an invitation some time about that time, and a car load, among them quite a lot of full-bloods, come out here. It didn't cost anything.

The DISTRICT ATTORNEY. The United States Government paid your way?

A. Yes, sir.

Mr. FREDERICK (of counsel for defense). That was in 1880?

A. Yes, sir; we were the last ones that ever come that way—that had their way paid.

Q. Did Jack leave about that ?

A. No, sir; a good while after that time.

Q. The same year, though?

A. Yes, sir; I tried to get them to come with us; they would have their way paid; they had to have so many before they would pay our way. A man by the name of Hambright was appointed by the Government to certify as to whether we were Indians or not. I moved o't there and after Colvard came he could not get anyone to certify, because that man was stopped by the Government. There was no one to say that he was an Indian.

Q. Do you know why Colvard didn't come with you all?

A. I do not know; he just said he didn't want to come.

173 Q. Did he not claim to be a citizen?

A. There was never nothing said about his citizenship then.

Q. When he came out here did he not claim to be a citizen?

A. Yes, sir; he claimed to be a citizen.

Q. He did business there as a citizen?

A. Yes, sir; I never heard anything to the contrary. I was in danger myself in doing business with him, but I didn't know it at the time, for I never heard the citizenship question sprung.

Q. You never heard of the question until after his wife's death?

A. Yes, sir; he came to me and told me they were talking of stopping him, and he had married my sister, and I supposed everything was all right, and I asked him why, and he said because he did not marry under the laws.

Q. If he had come under the North Carolina invitation it would not have been necessary to remarry?

A. That is the way I understood.

Q. You married a North Carolina woman—you were married in North Carolina?

A. Yes, sir.

Q. And so did Jack?

A. Yes, sir.

Redirect examination:

The DISTRICT ATTORNEY. When you came back did you take the oath of allegiance?

A. No, sir; I was adopted here in 1871.

Q. By an act of the council?

A. Yes, sir; there was no court then.

Q. You were adopted in 1871?

A. Yes, sir.

Q. By an act of the council?

A. Yes, sir.

174 Q. Although you were an Indian by blood it become necessary for the Cherokee Nation to adopt you before you become a citizen?

A. Yes, sir.

Q. Because you were a North Carolina Indian, and your father was a white man, was he not?

A. Yes, sir; my father was a white man.

The COURT. When were you adopted; in 1871?

A. Yes, sir.

Q. By an act of the council?

A. Yes, sir.

The DISTRICT ATTORNEY. He was here in 1871 and went back.

The COURT. You did not come under the invitation was extended in 1880?

A. No, sir; I went back to North Carolina; I went back and was married in North Carolina.

Q. You were adopted by a special act of the council in 1871?

A. Yes, sir.

Q. Then, of course, you did not come in under the invitation, and did not have to take the oath of allegiance, as required in your country?

A. No, sir; I do not think they require any Cherokee to take it.

The COURT. Everybody, whether they are Indians by blood or not, under the decision of the Supreme Court in the North Carolina case, have to be adopted. It is just like a white man has to be adopted. In the case of the Cherokee trust funds, the Supreme Court says:

"The Cherokees in North Carolina dissolved their connection with their nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves has been merely a social or busi-

175 ness one. It was formed in 1868, at the suggestion of an officer of the Indian office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws."

It does not make any different' whether a man was an Indian by blood or not when he become a citizen of North Carolina; in order to get into the Cherokee country he had to be adopted by the Cherokees.

The DISTRICT ATTORNEY. He was married to your sister in North Carolina, was he not?

A. Yes, sir; he was married in North Carolina.

Q. That was Colvard I am speaking about?

A. Yes, sir; I never did know Mr. Colvard until after he was married; I was living probably 50 miles from him.

Q. You say at the time that you administered this oath and made application for license you were not aware that he was not a citizen?

A. No, sir; I never had heard the question sprung; I thought that he had married under the law; I didn't know any difference about it.

Q. You thought he had married again and became a citizen here by adoption?

A. Yes, sir.

Q. You did not know different until after his wife's death?

A. Yes, sir; and he would not have told me then if he had not seen that he was in danger, and he saw he had got us in danger, for it was against the law for us to sell to him, and he came to me.

176 Q. And then let you have the goods back?

A. Yes, sir; in order to protect us and protect himself.

Mr. FREDERICK (of counsel for defense). You have never taken any oath to the Cherokee Nation?

A. No, sir; I was adopted by the council.

Q. You have to make an affidavit when you go to get a license?

A. Yes, sir; to trade; we all make that.

Q. Nobody but a citizen of the Cherokee Nation can get license to trade in that country?

A. That is the law; there is lots of them doing business there that do not get any license.

The COURT. Without any license at all?

A. Yes, sir; there is lots of claimants in business that do not get license. The Government holds them there some way.

Mr. FREDERICK (of counsel for defense). In the Canadian district they can get license from the United States?

A. Yes, sir; that is what I have understood.

(Witness excused.)

177 JOHN M. INGRAM, having been recalled by the Government, was examined by the district attorney, and testified as follows, to wit:

Question. I will ask you if you examined the rolls of citizenship of the Cherokee Nation to ascertain if Colvard was a citizen—was on the rolls?

A. Yes, sir; I examined the rolls.

Q. Did you find his name there?

A. I found his name as a white man; I did not find his name as a citizen.

Q. You found his name upon the roll of white men?

A. Yes, sir; and while I was looking over the record——

Q. But not as a citizen?

A. Yes, sir.

Q. How was that; was there a list there for white men?

A. The cause of that must have been that he was not admitted. In looking over the rolls, over the record before, I had Will Thompson to help me—he is executive secretary—and before we got to Colvard's name we found my father's name, and where his name was down it said, "Right by wife," and when we come to Colvard's name it did not say anything; it just said "White man."

(Witness excused).

Government rests.

Here court took a recess until 1:30 p. m.

178 The defendant then introduced and examined the following-named witnesses: Switch Foreman, Allen Hughes, John Hicks (the defendant). Testimony of W. J. Murphy and Robert Murphy, taken before the commissioner, introduced in evidence by the defense. Certified copy of application for license made by deceased Colvard, introduced by deft., who testified as follows, to wit:

179 AFTERNOON SESSION, 2:00 o'clock.

Testimony introduced by the defense.

SWITCH FOREMAN, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. Is your name Switch Foreman?

Answer. Yes, sir.

Q. You are a Cherokee citizen?

A. Yes, sir.

Q. You talk English and Cherokee both?

A. Yes, sir.

Q. Do you know John Hicks?

A. Yes, sir.

Q. Did you know Stand Rowe?

A. Yes, sir; I had seen him several times.

Q. Did you know Jack Colvard?

A. Yes, sir; I knew him.

Q. Were you at the dance at Jim Rowe's last February was a year ago?

A. Yes, sir; I was there.

Q. What time did you go there?

A. I went there about 9 o'clock that morning; they had a working there the day before the dance.

Q. Was Stand Rowe there that day?

A. No, sir; he wasn't there.

Q. Was Jack Colvard there?

A. No, sir.

Q. Was John Hicks there?

A. No, sir; I didn't see him there that day.

Q. You remained over for the dance at night?

A. Yes, sir.
Q. What kind of a working was it they had?
A. They had a rail mauling.
180 Q. Was there any liquor there that day; any whiskey?
A. No, sir; I did not see any.
Q. Did you see any at night?
A. Yes, sir.
Q. Who had the whiskey there?
A. Tom Gallcatcher.
Q. Was Tom at the working?
A. No, sir; he was not there that day.
Q. What time did John Hicks get there?
A. I don't know what time he got there; it was along about 10 o'clock, though, before I saw him.
Q. Did anyone come with him?
A. There was not anybody with him when I saw him.
Q. What time did Jack Colvard get there?
A. I don't know; it was real late before I saw him.
Q. What time did you leave there the next day?
A. I left there about 8 o'clock, I guess; maybe not quite so late.
Q. Was that night a clear night, or cloudy?
A. I think it was.
Q. Did the sun shine out the next morning?
A. Yes, sir; I think it did.
Q. How high was the sun when you left there?
A. I don't know exactly how high it was; it was, I think, though, about 8 o'clock.
Q. Had Stand Rowe and Jack Colvard and John Hicks left before you did?
A. Yes, sir.
Q. Which of those three left first?
A. Well, John Hicks and Stand Rowe left first.
Q. Who went with them when they left?
A. I don't think there was anybody went with them.
Q. Did they come back any more?
181 A. Yes, sir; John Hicks came back.
Q. How long was he gone before he came back?
A. I don't know exactly how long it was; about half an hour or an hour; somewheres along there.
Q. Where was Colvard while they were gone?
A. He was around there; I don't know where he was all that time, but I saw him around there.
Q. Did he not go off with them when they left?
A. He went off with them—well, he went off with John Hicks, I think, after he came back.
Q. After John Hicks came back?
A. Yes, sir.
Q. Was John riding or walking?
A. He was riding.
Q. How was Colvard?
A. He was riding too.

Q. When John Hicks came back where was Colvard?
A. He was in about 20 or 25 steps of where I was; I was there at the fence, and John Hicks came there, and Jack was about 20 or 25 steps away from there.
Q. How long did John stay when he came back?
A. He did not stay any time; just rode up there and spoke a couple of words to me.
Q. What did he say to you?
A. He inquired for a fellow named Sam Lacey.
Q. Who is Sam Lacey?
A. He is a Cherokee fellow.
Q. Where was Sam?
A. He had went home, I think.
Q. Sam had been there that morning, had he?
A. Yes, s'r.
Q. He had gone home?
A. Yes, sir.
Q. John Hicks came up there; what did he ask you about Sam Lacey?
A. He just asked me where he was, and I told him I thought
182 he had gone home.
Q. What did John do then?
A. He didn't do anything; he just turned his horse and went back the way he came.
Q. How near was he to Jack Colvard?
A. He was about 25 or 30 steps, I guess.
Q. Did he speak to Jack Colvard?
A. Not that I heard.
Q. You could have heard him, I suppose, if he had.
A. Yes, sir.
Q. When he left, what became of Jack Colvard?
A. When John left, Jack says, "Let me go home with you."
Q. Said to you?
A. John Hicks.
Q. How close was Jack to him; that is, when he said that?
A. About 25 or 30 steps, about.
Q. What was Jack doing off about 25 or 30 steps?
A. Wasn't doing anything, only setting there on his horse?
Q. When he spoke to John Hicks he said what?
A. He said, "Let me go home with you."
Q. What did John say?
A. He never said a word.
Q. What was John doing at that time?
A. At that time he was just turning his horse to ride off.
Q. John did not answer him at all?
A. No, sir; he never spoke to him at all.
Q. What did John do then?
A. He just rode on.
Q. What kind of a gait?
A. He just went on in a walk.
Q. What direction did he go; do you know where Murphy lives?
A. Yes, sir; he went a little to the west; about southwest, I guess.

Q. Was that in the direction of Murphy's?

A. No, sir; a little right west of Murphy's; he went on a lit-
183 tle trail that he rode on, and Colvard said to me, "Let me go home with you," and Hicks went on.

Q. What did Colvard do then?

A. He said, "I will go anyhow," and started.

Q. What kind of a gait did he go?

A. He went off; I think he paced his horse; his horse was pacing.

Q. His horse was a pace horse?

A. Yes, sir; he went on and overtook John, and then went on ahead of him.

Q. What gait was he traveling when he overtook him and went on ahead of him?

A. He was just in a pace.

Q. What direction did he go then?

A. He went right on ahead of John, the same direction John was.

Q. You know about where Colvard was killed?

A. Yes, sir.

Q. You found his body, I believe?

A. Yes, sir.

Q. With regard to where his body was found, how was Jack Colvard going; was he going in the direction of where you found his body?

A. No, sir; he was going west of that.

Q. With regard to Murphy's, what direction was he going?

A. He was going a little west of Murphy's.

Q. About how far from where you found him was it to where you saw him last where he rode on passed John Hicks?

A. About 250 yards.

Q. How far did you watch them together?

A. I did not watch them no distance; just as they rode off, as I seen Jack was ahead of John, I just turned then and went off some other place.

Q. Did you know of any ill feeling existing between these people?

A. Yes, sir; I did not know of any at all.

184 Q. What was John Hicks's condition with regard to being drunk; was he drinking, or was he sober?

A. I don't know; he seemed to be sober to me. I didn't notice him being anyways drunk.

Q. How was Stand Rowe?

A. He seemed to be kind of drunk to me.

Q. How did Colvard seem?

A. He seemed to be drunk, too.

Q. When John Hicks rode up and asked you where was Sam Lacey, who was standing near you or about you there?

A. I don't recollect now who it was, except one fellow, Nelse Hicks was one fellow.

Q. Who is Nelse Hicks?

A. John Hicks's brother.

Q. Do you know Joe Downing?

A. Yes, sir.

Q. Where was he?

A. I don't know where he was, whether he was there or not.

Q. Was he at the place then or had he gone home?
A. No, sir; I think he was still there.
Q. Can you state whether or not he was standing near you or near Hicks?
A. No, sir; I don't know whether he was or not.
Q. Did you hear the guns fire?
A. I didn't notice any guns fire at that time.
Q. How long after that until you left?
A. Oh, it was about 25 or 30 minutes.
Q. What road did you go?
A. I went the road the direction of Murphy's.
Q. Did you go the same way they went?
A. No, sir; I went another road; they went a trailway, and I went home the big road.
Q. Where does the trailway lead to? Does it lead into the big road?
A. Yes, sir; it runs back into the road, right there about 50 or 75 yards of Murphy's house.
185 Q. Does the road make a bend around that way, and the trail go across the bend?
A. No, sir; the trail makes a bend; it runs right alongside of a hill and then right on back towards Murphy's.
Q. You say you know Joe Downing; was he standing near you?
A. I don't know whether he was or not.
Q. How near to John Hicks were you when John said to you, "Where is Sam Lacey?"
A. I was in about 5 or 6 steps from him.
Q. As far as from here to you?
A. Yes, sir; just about, I guess.
Q. Did you see Bill Downing there?
A. I don't know.
Q. You don't know Bill Downing?
A. No, sir.
Q. Did you see Jim Downing then?
A. Yes, sir; I know he was there.
Q. You saw Jim there?
A. Yes, sir.
Q. Where was Jom Downing at the time John Hicks came up and inquired for Lacey?
A. I don't know where he was.
Q. Was he close to you?
A. I don't know whether he was or not; I didn't notice him around there.
Q. You didn't notice Jim Downing if he was there?
A. No, sir; I never.
Q. Did John Hicks speak in English or Cherokee?
A. He spoke in English to me.
Q. How long did John stay there?
A. He did not stay there any longer than he inquired for Sam Lacey, and I told him that he had gone home, and that is all then, and he turned his horse's head then and went on back.
Q. Did he have any conversation with anybody else there at that time?

A. No, sir; I think not.
Q. Was Eli Batt there?
A. Yes, sir.
186 Q. Where was he at that time?
A. I don't know where he was.
Q. When Stand Rowe and Jack Colvard and John Hicks went off first who all went with them, and what direction did they go?
A. I don't know.
Q. You did not notice about that?
A. No, sir.
Q. You do not know which way they went?
A. No, sir.
Q. Did you see Stand Rowe leave?
A. Yes, sir; I saw him leave.
Q. Who was with him?
A. John Hicks.
Q. Who else?
A. Nobody that I know of.
Q. Which way did Stand go from Jim Rowe's?
A. They went right west, I believe.
Q. Which way is Murphy's house from Jim Rowe's?
A. It is south.
Q. Did they go a road?
A. Yes, sir; they wenta trailway; the same trailway that Jack and John went.
Q. How many roads are there *there* going by Jim Rowe's house?
A. I think there is about 4 or 5.
Q. What road is this that you went?
A. That goes around by Murphy's.
Q. What road do they call it; is it a public road?
A. Yes, sir; it is a public road.
Q. What road do they call it, do you know?
A. No, sir; I do not know the road. It is a road, and that is all I can tell you. It is a road that runs right down the creek.
Q. A wagon road?
A. Yes, sir.
Q. Do you know where John Hicks lived at that time?
A. No, sir; I don't.
Q. But the way they went was down the creek?
A. Yes, sir.
187 Q. Which way did Stand Rowe live from there?
A. I think he lived down the creek from there; I never was at his house; I do not know where he lived exactly.
Q. How many people were at that dance do you think?
A. I do not have any idea; there was a good many people there.
Q. A good many men.
A. Yes, sir.
Q. Any girls?
A. Yes, sir; there was some girls there.
Q. Was Stand Rowe's people there?
A. Yes, sir; there was some of his people there; some of his kinfolks.

Q. Which were they?
A. I think the Downing boys were there; they were kin to him.
Q. How were they akin to him?
A. I don't know; I just heard they were kin.
Q. Were there any of Stand Rowe's girls there?
A. Yes, sir; two of them, or one; I don't know which.
Q. Which one of them?
A. Annie Rowe.
Q. She was there?
A. Yes, sir.
Q. How far did you live from Jim Rowe's?
A. About three miles and a half or four miles.
Q. Did you visit there often?
A. Yes, sir.
Q. You were about there pretty often, were you.
A. Yes, sir.
Q. This girl of Stand Rowe's, Annie, was she there often; did she stay there a good deal?
A. Yes, sir; she staid there.
Q. Did Jack Colvard come there often?
A. Yes, sir; I think he did.
Q. Did he come to see that girl?
A. I don't know whether he come to see her or not.
Q. How far was it to Jack Colvard's?
188 A. About 8 or 10 miles, I guess.
Q. What business was Jack in there at that time?
A. He was selling goods at a store.
Q. Which way was Colvard's home from there?
A. I think it was a little northwest.
Qq. Then Colvard did not go in the direction of his home when he went off with John Hicks?
A. No, sir; not exactly.
Q. Could he have gone home by going that road?
A. Yes, sir; he could have went on and took some other road and went on home.
Q. Were you there whan Eli Batt was playing the fiddle that morning?
A. No, sir; I never noticed him playing the fiddle at any time.

Cross-examination by the DISTRICT ATTORNEY:

Your name is Switch Foreman?
A. Yes, sir.
Q. You got the whiskey from Gallcatcher?
A. Yes, sir.
Q. How much did you get?
A. I don't know just exactly how much it was. It was some in a jug.
Q. Where did Gallcatcher get it, do you know?
A. I don't know, I could not say where he got it.
Q. You do not know whether he got it from somebody there, or whether he brought it there?
A. No, sir.

Q. How much did you get?
A. I don't know how much I got. There was some in a gallon jug, and there was some took out before I got it.
Q. Did you get all of it?
189 A. Yes, sir; I got all there was in that jug.
Q. How much did you pay for it?
A. Five dollars.
Q. Your money?
A. Yes, sir.
Q. Where did you get the money?
A. I don't know exactly now where I did get it. I had it, though.
Q. Silver?
A. Yes, sir.
Q. All silver?
A. Yes, sir.
Q. Had you been dancing any before you bought it?
A. No, sir; I didn't dance any that night at all.
Q. You didn't dance any, you drank?
A. Yes, sir.
Q. Did you drink it al' up?
A. Yes, sir; me and my friends all drank it.
Q. How many friends did you have, one or two?
A. I had lots of them.
Q. How much did Hicks drink?
A. I don't know whether he drank or not.
Q. How much did Stand Rowe drink?
A. I don't know that.
Q. How much did Mr. Switch Foreman drink?
A. He drank about a pint, I guess.
Q. He got down, did he not?
A. No, I didn't get down.
Q. You got up, you did not get down?
A. Yes, sir.
Q. How high did you get up?
A. Oh, not very high.
Q. You got drunk, didn't you?
A. Yes, sir; I got pretty drunk.
Q. What time in the day did you get drunk?
A. It was in the night; I don't know just exactly what time in the night it was.
Q. Did you let Colvard have the whiskey?
A. No, sir.
Q. You got pretty drunk?
A. Yes, sir.
190 Q. You were drunk the next morning, too, were you not?
A. Yes, sir; I was pretty drunk the next morning.
Q. I suppose that lasted a good long while, that whiskey, didn't it?
A. No, sir; it didn't last very ling.
Q. You were drunk in the morning?
A. Yes, sir.
Q. You were drunk when you found the dead man, were you not?

A. Yes, sir; I was a little drunk yet.
Q. You thought that he was thrown from the horse, didn't you?
A. Yes, sir.
Q. Did you see him when he fell from the horse?
A. No, sir.
Q. You thought that he had fallen because you found him laying there in the road?
A. Yes sir.
Q. You managed to get back and tell the boys about it?
A. Yes, sir.
Q. Pretty hard work, was it not?
A. No, sir; not very hard work.
Q. You were horseback?
A. Yes, sir.
Q. You managed to stick on your horse and get back?
A. Yes, sir.
Q. How long before you got sober?
A. Not very long.
Q. How long before you switched off that drunken spree and got sober?
A. Not very long.
Q. An hour or two after you saw the blood of the dead man?
A. Yes, sir; maybe not quite so long.
Q. We will say an ho'r before you got sobered up?
A. Yes, sir; about an hour, I guess.
Q. It feels pretty good to get drunk, does it not?
A. Yes, sir; sometimes it does.
Q. When you get drunk you are not paying much attention to
191 what goes on around you, are you?
A. No, sir.
Q. You did not know that Hicks and Stand Rowe were going to kill Colvard that day?
A. No, sir.
Q. Therefore, when Hicks came back you did not pay much attention to him?
A. No, sir.
Q. You didn't know whether he talked to Colvard or not, did you?
A. No, sir; I never.
Q. You were drinking and feeling good—you know how that is?
A. Yes, sir.
Q. And you did not pay much attention to what he did do?
A. No, sir.
Q. He might have talked to Colvard and you not know it?
A. I don't know whether he did or not; I didn't hear him.
Q. But you were drunk?
A. Yes, sir.
Q. You didn't wat*ch* him. You did not know he was going to kill somebody?
A. No, sir.
Q. You saw him ride up there?
A. Yes, sir.
Q. Were you leaning against the fence puking?

A. No, sir; I was not puking; I was standing there against the fence, though.

Q. Were you holding up the fence, or the fence holding you up?

A. The fence held me, I guess.

Q. Wasn't there two fences there?

A. No, sir.

Q. Only one?

A. Yes, sir.

Q. What were you leaning up against the fence for?

A. Oh, just because I felt a little tired.

Q. A little tight, didn't you?

A. Yes, sir.

Q. Tight and tired both, was it?

A. Yes, sir.

Q. Two "t's"?

A. Yes, sir.

192 Q. You were tight and you were tired?

A. Yes, sir.

Q. You hadn't slept any that night, had you?

A. No, sir.

Q. You were on a spree?

A. Yes, sir.

Q. Colvard was out just on the outside of the fence, was he not?

A. Yes, sir.

Q. You were on *on* the inside?

A. No, sir; I was on the outside.

Q. What were you doing on the outside?

A. I don't know, but I was on the outside?

Q. You went out of the house to throw up, didn't you?

A. No, sir.

Q. Had you thrown up any that night?

A. No, sir.

Q. You still held it on?

A. Yes, sir.

Q. You sobered up without puking?

A. Yes, sir; I think I did.

Q. You are certain of that, are you?

A. No, sir; not certain.

Q. You were on the outside?

A. Yes, sir.

Q. You say that Murphy's is south?

A. Yes, sir; to the best of my knowledge it is south.

Q. Then, if Murphy's is south, you were on the south side of the house?

A. No, sir; I was on the west side of the house.

Q. Where was Colvard?

A. He was north of me about 20 steps.

Q. On the same side of the house?

A. Yes, sir; a little further north than I was.

Q. On the west side of the house?

A. Yes, sir.

Q. Both of you on the west side of the house?
A. Yes, sir.
Q. You were leaning up against the fence, and Colvard was on his horse close to the fence?
A. Yes, sir.
Q. And just a few feet apart?
A. Yes, sir.
193 Q. Five or six feet apart, you and Colvard?
A. No, sir; he was anout 20 steps north of me.
Q. Which way did Hicks come from?
A. He come from about southwest, I guess.
Q. He came from the southwest, and Murphy lived down about that way [indicating]?
A. Yes, sir.
Q. He didn't come from the direction of Murphy's, did he?
A. No, sir.
Q. For Murphy's is south, and he came from this direction?
A. Yes, sir; Murphy lived down here.
Q. That is about the way you have it?
A. Yes, sir.
Q. But if Murphy's was west, then it would turn it around this way, and he would have come from the northwest?
A. Yes, sir.
Q. It would just be turned around, and that would be all?
A. Yes, sir.
Q. You think Murphy's was south?
A. Yes, sir.
Q. And it was upon the same side of the house—was it upon the same side of the house, or was it towards Murphy's that you were at?
A. No, sir.
Q. You were on the front of the house, were you not, at the front?
A. No, sir; I was back of the house.
Q. Then Mr. Colvard was on one side, was he not?
A. Yes, sir.
Q. He was on the side next to Murphy's?
A. No, sir; on the side I was, nearer to the corner.
Q. Next to Murphy's?
A. No, sir; he was further than I was.
Q. You saw Hicks ride up there?
A. Yes, sir.
Q. How far could you see him?
194 A. He wasn't any more than about ten or fifteen steps when I saw him coming.
Q. Was he sober?
A. I don't know; he did not seem to be drunk.
Q. You had your head down this way, didn't you?
A. No, sir; I was standing up with my head up.
Q. Head up and tail over the dashboard? Now, tell me what you were doing out there?
A. I don't think I was doing much of anything, standing there.

Q. What took you there? The rest of them had all gone in the house, had they not?

A. No, sir; there was several fellows standing there with me.

Q. Who were they?

A. I can not remember who they were, except one fellow, and that is Nelse Hicks.

Q. Is he here?

A. No, sir.

Q. Several fellows standing around?

A. Yes, sir.

Q. The Downings were standing around?

A. I don't know whether it was them or not.

Q. But there was somebody there?

A. Yes, sir.

Q. It may have been the Downings?

A. Yes, sir; it may have been of course; I don't know.

Q. How is it you do not know?

A. I just never noticed.

Q. You were drunk and was not paying any attention?

A. I guess so.

Q. You were not paying any more attention to John Hicks, were you?

A. No, sir.

Q. Hicks might have talked to half a dozen of them, and you not know it?

A. Yes, sir; he might have.

Q. He might have talked to Downing or Colvard?

A. Yes, sir; he might have. Of course, I don't know, but
195 then I never seen him talking to any of them.

Q. Did you take any more whiskey after that?

A. No, sir.

Q. How long was that now before you found the body?

A. It was about half an hour, I guess.

Q. And then it was an hour after that before you sobered up?

A. Yes, sir.

Q. Then you had whiskey enough in you that you did not get sober for an hour and a half after this thing occurred? That is about how drunk you were?

A. Yes, sir.

Q. Did things swim around a little?

A. Yes, sir; a little.

Q. Was the sun up?

A. Yes, sir; I think it was—yes, sir; it was up.

Q. Do you remember of seeing it?

A. Yes, sir; I think I seen it.

Q. Did it look like two or one?

A. It looked like one to me.

Q. You do not see double when you get drunk?

A. No, sir.

Q. Now then, he rode up there and Colvard was there?

A. Yes, sir.

Q. Stand Rowe didn't come with him?

A. No, sir; I didn't see him.
Q. When he went off Colvard went with him?
A. Yes, sir.
Q. You are certain of that?
A. Yes, sir.
Q. Now then, how long after that before you heard the shots fired—you didn't hear them, though?
A. No, sir.
Q. Did you go on the inside of the house?
A. Yes, sir.
Q. When did you come out there?
A. I don't know; I had been out there a right smart while.
Q. Now, tel' me what you were doing there?
A. I don't know what I was doing; I was ther' talking to some fellows.
196 Q. Now, tell me who you were talking to?
A. I don't know who the other fellows were, but one was Nelse Hicks.
Q. How do you remember him and not anybody else?
A. Because we were talking.
Q. What were you talking about?
A. I don't know what we were talking about.
Q. Did you go up the road with the crowd there, with the crowd that went up to get a drink?
A. No, sir; I never went.
Q. Then you did not see what occurred up there?
A. No, sir.
Q. Mr. Frederick asked you something about when Hicks and Stand Rowe and Colvard all went off together; do you remember about that?
A. No, sir; I don't remember.
Q. You don't remember about that?
A. No, sir.
Q. I guess you didn't see them go off?
A. No, sir; I did not see them go off together.
Q. I guess you did not see Stand Rowe go off at all, did you?
A. Yes, sir.
Q. Which way did he go?
A. He went off west.
Q. He went west?
A. Yes, sir.
Q. He did not go in the direction of Mr. Murphy's?
A. No, sir; he went west of Murphy's.
Q. Murphy's was down here, down south, and he went kind of west?
A. Yes, sir.
Q. Right angles?
A. Yes, sir.
Q. Hicks was with him?
A. Yes, sir.
Q. He went up the hill, did he not?
A. I don't know whether he went up the hill or not.
Q. There is a hill out there, is there not?

A. Yes, sir.

197 Q. How long was that before Hicks came back?

A. I don't know exactly how long it was; about an hour, I guess.

Q. That was about an hour before Hicks came back, and he and Colvard went off again?

A. Yes, sir.

Q. About an hour, you think?

A. Yes, sir; as near as I can guess at it.

Q. When they were going off in that direction they were going towards Murphy's home, were they not?

A. Yes, sir.

Q. And not towards their home?

A. No, sir; I guess no'.

Q. Where did Colvard live?

A. He lived over there at Saline court-house, they call it.

Q. That is west, is it not?

A. Yes, sir.

Q. Which way did they live from there?

A. I guess they must have lived south.

Q. They lived south?

A. Yes, sir.

Q. If Murphy lives south they lived east of south, didn't they?

A. I guess so; I do not know exactly whereabouts they did live; I never was there, but I would always hear it was south.

Q. Were you with them when they went up there going west towards Colvard's home?

A. No, sir; I was not.

Q. Did you learn where they were going?

A. No, sir.

Q. But they started off going towards Colvard's home?

A. Yes, sir.

Q. Was Colvard ahead of them or behind them?

A. Colvard was not ahead of them or behind them, because he was not with them at that time; when I saw them he was not.

Q. How near to the road did you see them; how near were they to Mr. Jim Rowe's house?

A. They were not more than about 50 yards.

198 Q. In the road?

A. Yes, sir.

Q. Going east?

A. Going west.

Q. There is no road there going west, is there?

A. Yes, sir; there is a little road going right up the hollow.

Q. Where does that road go?

A. It goes to Colvard's.

Q. That road goes to Colvard's?

A. Yes, sir.

Q. That is the road you saw them on?

A. Yes, sir.

Q. Hicks was a horseback when he came back there?

A. Yes, sir.
Q. Just came riding back, and he and Colvard left together?
A. Yes, sir.
Q. Did he make any inquiry for any rope or anything of that kind?
A. No, sir; not to me.
Q. Did he get off his horse?
A. No, sir.
Q. When did Sam Lacey leave?
A. I don't know exactly how long it was before that time.
Q. Did he leave in the night?
A. No, sir; in the morning.
Q. He left before Hicks and Stand Rowe left?
A. I think so; I am not right sure.
Q. What makes you think that he left before Hicks and Stand Rowe left?
A. Well, I said I didn't know whether he did or not.
Q. You said you think so; what makes you think so?
A. Because I seen them, I think, afterwards.
Q. You say you think you saw them after Lacey left there?
A. Yes, sir.
Q. You say they were sober, that Hicks was?
A. Yes, sir; he seemed to be sober; I don't know for certain; he might have been drunk, but then he seemed to be sober to me.
199 Q. Lacey, you think, left first; you say you think you saw Hicks and Stand Rowe there after you saw Lacey?
A. Yes, sir.
Q. Then Hicks and Stand Rowe left, and in about an hour after they left Hicks came back and asked for Lacey, who had left before he did?
A. Yes, sir.
Q. Yet he was sober. Where did Lacey live?
A. I don't know where he lives.
Q. Were there a good many people drunk there that night?
A. Yes, sir; seemed to be a good many.
Q. Colvard was drunk himself, was he not?
A. He seemed to be drunk; yes, sir.
Q. Did you see any guns there?
A. Yes, sir.
Q. How many?
A. Two is all I think of.
Q. Who had them?
A. John Hicks and Stand Rowe.
Q. What were they doing with guns there?
A. I could not tell you; I don't know.
Q. Did they carry them with them all the time?
A. No, sir; I think not.
Q. What did they do with them?
A. I think they put them away in the house. I never seen them put them away, but then that is where I think they put them.
Q. Wasn't it this way: When one would be armed the other would not have his, and then, when the other was armed, the one who was armed at first would be without his arms?

A. I didn't notice that much.
Q. You noticed there was only two men who had guns?
A. There were only two that I seen.
200 Q. They had Winchesters, did they not?
A. Yes, sir.
Q. Do you know why they were having guns at the party?
A. I don't know.
Q. Were they on the scout?
A. No, sir; I don't know that, whether they were scouting or not. I think, though, that Stand Rowe was a little on the scout.
Q. You think he was a little on the scout?
A. Yes, sir.
Q. Don't you think that Mr. Hicks was just a little on the scout, too?
A. I don't know that.
Q. You hadn't heard that?
A. No, sir.
Q. At any rate, they were there with guns?
A. Yes, sir.
Q. And Hicks and Rowe came there together, didn't they?
A. I don't know whether they did or not.
Q. They left together?
A. Yes, sir.
Q. Did they seem to be together a good deal during the night?
A. No, sir.
Q. What time in the night was it you got down?
A. I didn't get down at all.
Q. You managed to stand. You were the first man to the body, were you not?
A. Yes, sir.
Q. Did you see anything of Hicks and Stand Rowe when you got to the body?
A. No, sir.
Q. Whoever had shot him had killed him and left?
A. I do not know that, either.
Q. You did not see anybody there?
A. No, sir; I never saw anybody there at all.
Q. Was that about halfway between Murphy's house and Jim Rowe house?
A. Yes, sir.
201 Q. About half way between?
A. Yes, sir.
Q. What was Colvard doing when you got to him?
A. Not doing anything but lying there.
Q. Was he dead?
A. I do not think he was dead; he seemed to be breathing yet.
Q. Did you see any blood on him?
A. Yes, sir.
Q. Where?
A. Right on the bosom of his shirt.
Q. Did you go up to him?
A. Yes, sir; I went up to him.

Q. Did you speak to him?
A. Yes, sir; I spoke to him several times; I didn't know he was killed; I just thought he had fell off of his horse, and I spoke to him and turned him over.
Q. You turned him over; you rolled him over?
A. Yes, sir.
Q. He was lying on his breast, was he not?
A. Yes, sir.
Q. On his belly?
A. Yes, sir.
Q. You were the man who turned him over, and then you saw the blood on his breast?
A. Yes, sir.
Q. Were you horseback or on foot?
A. I was horseback.
Q. You got off your horse?
A. Yes, sir.
Q. Where was his horse?
A. Standing right by him in the road.
Q. How close to him?
A. He was right there close to him.
Q. Not hitched?
A. No, sir.
Q. Did he have hold of it?
A. No, sir.
Q. Just standing over him, was it?
A. Yes, sir.
Q. Did the horse go away when you went up to him?
A. No, sir; the horse stood right there.
Q. Stood right there over the dead man?
A. Yes, sir.
Q. Did you go back?
A. Yes, sir.
Q. Was the horse still there?
202 A. No, sir; I think the horse had went away about 5 or 6 steps when I got back.
Q. And was standing around with the rest of the mourners?
A. Yes, sir.

Redirect examination by Mr. C. J. FREDERICK:

Was Joe Downing drunk?
A. Not that I know of.
Q. Was he drinking any?
A. Not that I seen.
Q. Was Tom drunk?
A. No, sir; I didn't see him drinking any there.
Q. You don't know whether he was drunk or not?
A. No, sir; I don't.
Q. You say there was several drunk people there?
A. Yes, sir.
Q. Were the Batts drunk?

A. Yes, sir; they seemed to be drinking or drunk.
Q. Was Eli Batt drunk?
A. Yes, sir; I think he was.
Q. Was Bill Batt?
A. Yes, sir.
Q. You think he was drunk?
A. Yes, sir.
Q. You do not know whether these Downing boys were drunk or not?
A. No, sir; I don't know whether they were drunk or not.
The DISTRICT ATTORNEY. He says he did not see them drinking.
Mr. FREDERICK (of counsel for defense). How was Dave Rogers; was he drinking?
A. Yes, sir; he was.
Q. He was drunk too?
A. Yes, sir.
Q. How was Jim Rowe? Was he drinking too?
A. No, sir; I did not see him drinking.
203 Q. Did you see Ben Christian there?
A. Yes, sir.
Q. Was he drinking?
A. Not that I know of.
Q. Was Robert Murphy?
A. I don't know whether he was drinking or not.
Q. You did not see John Hicks drinking?
A. No, sir; I did not see him drinking any there.
Q. You were not so drunk but what you remember what occurred? When John Hicks rode up and asked you about Sam. Lacey you knew what was going on; you knew what was going on, didn't you?
A. Yes, sir.
Q. You were not so drunk but what you could remember what happened there?
A. No, sir.
Q. You were not so drunk but what you knew what was going on?
A. No, sir.

Recross-examination:

The DISTRICT ATTORNEY. How do you know?
A. Because I recollect things there.
Q. If somebody else who was sober would say that something happened there in your presence and you didn't remember it, what would you think about it then?
A. I would think I wasn't there; I didn't see it at that time.
Q. You would probably think you were drunk, wouldn't you?
A. Yes, sir; I guess so.

Redirect examination:

Mr. C. J. FREDERICK. You are not mistaken about seeing John
204 Hicks there?
A. No, sir.
Q. You are not mistaken about seeing him when he came there or seeing him when he went away?
A. No, sir.

Q. You saw him when Colvard went away, and you are not mistaken about what he said there?
A. No, sir.

Recross-examination:

The DISTRICT ATTORNEY. You are not mistaken when you say you do not know whether he talked to Colvard there from you?
A. No, sir.

Redirect examination by Mr. C. J. FREDERICK:

You mean to say about that, you did not hear him talking to Colvard; he was not more than about 20 feet or yards from you?
A. Yes, sir; about that, I guess.
Q. Did he get any closer to Colvard?
A. I did not see him get any closer.
(Witness excused.)

205 ALLEN HUGHES, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. Your name is Allen Huches?
Answer. Yes, sir.
Q. Where do you live?
A. I live in the Cherokee Nation.
Q. Were you acquainted with John Hicks?
A. Yes, sir.
Q. Did you know Stand Rowe?
A. Yes, sir; I knew him when I seen him. I was not acquainted with him.
Q. Did you know Jack Colvard?
A. Yes, sir; I knew him when I seen him. I wasn't acquainted with him there.
Q. But you knew him when you saw him?
A. Yes, sir.
Q. Were you at the dance at Jim Rowe's last February was a year ago?
A. Yes, sir.
Q. How many people were there?
A. Well, I could not say.
Q. Were there a few or a good many?
A. There was a good many.
Q. Men and women?
A. Yes, sir.
Q. What time did you get there to the dance?
A. It must have been about 8 o'clock when I got there.
Q. Did you stay all night?
A. Yes, sir.
Q. Did you see John Hicks there that night?
A. Yes, sir.
Q. And Jack Colvard?
A. Yes, sir.
Q. Stand Rowe?
A. Yes, sir.

Q. Did you see them leave the next morning—or did they stay all night, I will ask you first?

A. Yes, sir.

Q. Did you see them leave?

A. Well, yes; I saw them leave.

Q. How did they go away?

206 A. Well, Stand Rowe first started off.

Q. How was he travelling?

A. He was on foot, I think—yes, sir; he was a-foot.

Q. Did you see him riding at all?

A. No, sir; I did not see him riding at all.

Q. How was John Hicks travelling?

A. He was a-foot.

Q. Did you see their horses there?

A. No, sir; I didn't see their horses there.

Q. How was Colvard; was he riding or walking?

A. He was horseback.

Q. What time did you leave there the next morning?

A. It must have been 7 o'clock, I guess.

Q. When you saw Stand Rowe leave, now, which way did he go; where did he go?

A. He went off down the road, down towards—I forget the name of the place now they call it, but down the creek, anyway.

The DISTRICT ATTORNEY. Murphy's?

A. Yes, sir.

Mr. FREDERICK (of counsel for defense.) Went down towards Murphy's?

A. Yes, sir.

Q. Did you see him come back?

A. No, sir.

Q. Which way did Colvard go?

A. He went off down the same road.

Q. He was riding?

A. Yes, sir.

Q. Did you see him come back?

A. No, sir; I didn't see him come back.

Q. How long after you saw them leave that 'ay before you left?

A. Just right afterwards. I had started when he started.

Q. Do you know how they came there; whether they came horseback or on foot—I mean John Hicks and Stand Rowe?

A. I don't know how they came there; when I saw them they came on foot.

207 Q. They were on foot?

A. Yes, sir.

Q. You left right straight?

A. Yes, sir.

Q. Was there any drinking there, much, that night, of whiskey?

A. There seemed to be some drinking.

Q. Did you drink any?

A. No, sir; I didn't drink any.

Q. Did you see anybody drinking?

A. Well, I seen some drinking, but I don't recollect now who it was. I don't know; I don't know whether I could call their names or not.
Q. Did you see the Downing boys there?
A. I guess so; I did not know them at the time.
Q. You have seen them here, haven't you?
A. Yes, sir.
Q. You have seen Jim Downing here?
A. Yes, sir.
Q. How was he; was he drinking?
A. He might have been drinking, but I don't think they were drinking.
Q. Did you see Joe Downing there?
A. Yes, sir; I guess I saw him there if he was there; I didn't know him at that time.
Q. You have seen him here to-day, have you not?
A. Yes, sir.
Q. Did you see him there then? Is that the one you saw there?
A. I think it is the same man.
Q. How was he; drinking or not?
A. No, sir; he was not drinking much, I don't think.
Q. You did not see him get drunk?
A. No, sir.
Q. There were a good many people there?
A. Yes, sir.
Q. Were there any girls or women there?
A. Yes, sir; a good many girls.
Q. They danced all night, did they not?
A. Yes, sir; they danced pretty near all night, I think.
Q. You think; you were there all night, were you not?
A. Yes, sir; I think, though, they did not dance plumb on until daylight; they stopped dancing before daylight.
208 Q. What was the matter; what made them stop?
A. I don't know.
Q. Too many of them got drunk?
A. Yes, sir; I guess that was the cause of it.
Q. There was a good many of them drunk there?
A. Yes, sir; they were drinking considerable.
Q. Was there any fusses or rows there?
A. Yes, sir; there was a little row the next morning, there.
Q. I will ask you if you saw John Hicks in any fuss or difficulty?
A. No, sir; I didn't see him in any fuss.
Q. How did he seem to be; sober or now?
A. He seemed to be sober.
Q. How was Stand Rowe—how did he seem?
A. He seemed to be drinking right smart.
Q. How was Colvard?
A. He was drinking right smart.
Q. You were not there then when they rode off on their horses?
A. No, sir; I was not there.

Cross-examination:

The DISTRICT ATTORNEY. Let's see; are you sure you were there at all? Who did you go with?

A. I went with Clarke Collins and Robert Dirteater and Joe Dirteater.

Q. Are they here?

A. Robert is.

Q. Robert Dirteater is here?

A. Yes, sir.

Q. You went with them, did you?

A. There was two or three more along.

Q. Who were they?

A. I forget now who they were.

209 Q. You don't remember who?

A. No, sir; I don't remember who they were.

Q. Was your brother along?

A. No, sir; he didn't go.

Q. Your brother didn't go?

A. No, sir.

Q. Layfayette was not there, was he?

A. No, sir; he was not at the dance.

Q. What is your name?

A. Allen Hughes.

Q. You saw the defendant and Rowe walk off together, did you?

A. No, sir; they didn't go off together, I don't think; Rowe went off before Hicks did.

Q. Where was Rowe's gun?

A. He had it with him, I think.

Q. Did Hicks carry his gun with him?

A. Yes, sir; I think he had it with him when he started home.

Q. How do you know they started home?

A. John told me.

Q. John Hicks?

A. Yes, sir. He told me he was going to go home.

Q. He told you that he was going to go home?

A. Yes, sir.

Q. That was about 7 o'clock in the morning, was it, about sunrise?

A. Yes, sir; a little after, I think.

Q. A little bit after?

A. Yes, sir.

Q. About how high was the sun?

A. I could not say. It was not half an hour high yet, I do not think.

Q. John told you he was going home?

A. Yes, sir.

Q. Did he have his gun when he told you?

A. He had started then, when he told me.

Q. How far ahead of him was Stand Rowe?

A. I don't know; he had just gone on a few minutes.

210 Q. Were they going towards Murphy's?

A. Yes, sir.

Q. Was there anybody with them? Was Calvert with them?

A. Yes, sir; Colvard was with John, and there was another fellow with him.

Q. Who was it?

A. I believe they call him Stand Mixwater.

Q. Stand was on a horse, was he not?

A. Yes, sir.

Q. And Mixwater was on the same horse, was he not, or another horse?

A. He was on another horse, I think—yes; he was on another horse.

Q. Are you not just telling something that somebody has told you?

A. No, sir.

Q. Eh?

A. No, sir.

Q. Don't you know that Mixwater lost his horse that night, and that he rode next morning with Colvard on his horse, that the two were riding together, next morning, on the same horse? Think about that. I know you want to get it right.

A. That is my recollection.

Q. That they were riding on one horse?

A. No, sir; that he was on a horse to himself.

Q. Don't you know that the defendant and Stand Rowe were both on horseback? When they started away from there that they were?

A. No, sir; I didn't see them on horseback at all.

Q. They told you they were going home. How far did they pass off before they got out of your sight, before you saw Colvard coming back, and Mixwater?

A. I didn't see Colvard coming back.

Q. Colvard didn't come back before you left?

A. No, sir; I was on my way then, home; I had started.

Q. Had you started?

Q. Yes, sir; I was on behind another fellow.

211 Q. Who were you behind?

A. It was either Tom Gallcatcher or Clarke Collins, one; I think it was Clarke.

Q. Tom Gallcatcher?

A. Yes, sir; or Clarke, one.

Q. Did Tom Gallcatcher go home at that time?

A. Yes, sir.

Q. Are you sure?

A. Yes, sir; he went on with us.

Q. They went off on foot, did they, these two men, and the defendant told you he was going home?

A. Yes, sir.

Q. How far from the house did you see him?

A. Only about 50 yards, where the roads forked; I took the left hand and they went down the right hand.

Q. Did you take the Tahlequah road?

A. Yes, sir; that is, the road leading out to Tahlequah.

Q. You went down to the road leading to Tahlequah?

A. Yes, sir.

Q. Then you turned to the left, and then they went straight on?

A. Yes, sir; they went on down the road.

Q. Right straight down the road that leads down the creek?

A. Yes, sir.
Q. And Mr. Stand Rowe was ahead on foot, carrying his gun?
A. Yes, sir.
Q. How far ahead?
A. Well, I don't know how far; he had just been gone a few minutes, not more than two or three minutes.
Q. Just those four men now went off together? Now, I want you to remember about that and see if these two men were not on horseback when they left there, Stand Rowe and ——
A. No, sir; I did not see them on horses at all.
Q. I guess you were pretty full, were yoj not?
A. No, sir; I was not drinking at all.
Q. And you were there?
A. Yes, sir.
212 Q. Nobody else but those four go down that way?
A. That is all I seen at that time.
Q. Did you see Bill Batt?
A. Yes, sir; he was there at the house.
Q. Was he not with them?
A. No, sir.
Q. Did you see Tom Batt and Eli Batt?
A. No, sir; but I seen them there at the house.
Q. They were not going down there with them?
A. No, sir; they didn't start off with them.
Q. So Mr. Stand Rowe went off ahead carrying his gun?
A. Yes, sir.
Q. And then Hicks and Colvard and Mixwater they went off next, did they?
A. Yes, sir.
Q. All three together?
A. Yes, sir.
Q. You saw them going on down that way?
A. Yes, sir.
Q. And that is all you know about it?
A. Yes, sir; I left them and went on——
Q. Where did Colvard say he was going?
A. He didn't say; he was drunk.
Q. What did he say?
A. I could not say what he said.
Q. Where did Mixwater say he was going?
A. He did not say; he did not say anything about that at all.
Q. Which way does Murphy live from Rowe's, south or west?
A. Well, I would call it west, I believe.
Q. Is there a big road going passed his house?
A. Well, it is not a big road; it is a wagon road though.
Q. Do you know where the road is that leads up to Saline Court-House?
A. No, sir; I don't.
Q. How many rooms are there at Jim Rowe's house?
213 A. There are just two rooms.
Q. You do know that when Hicks told you he was going home, that was early in the morning, about seven o'clock, and that Mixwater and Colvard started off with them?

A. Yes, sir.

Q. You didn't see them come back, and know nothing else about it?

A. No, sir.

Q. Whatever direction they went or whether they were horseback or foot you know they started off together?

A. Yes, sir.

(Witness excused.)

214 JOHN HICKS, having been duly sworn in his own behalf, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. Your name is John Hicks?

Answer. Yes, sir.

Q. You are charged here with being accessory to the murder of Jack Colvard?

A. Yes, sir.

Q. I will ask you to tell the jury now where and when was it you got with Stand Rowe that evening before you went to Jim Rowe's?

A. Well, in 1892, February 12th, I started to my brother-in-law's, Than Wofford's——

Q. Where did you start from?

A. I started from home over there at the mouth of Spring Creek.

Q. Is that the creek Jim Rowe lives on?

A. Yes, sir.

Q. What time did you start from home?

A. I started early in the morning.

Q. How far did you live from Jim Rowe's?

A. About 22 or 23 miles.

Q. You started from home to go to Than Wofford's?

A. Yes, sir.

Q. Go ahead and tell us now where you went to.

A. Before I got there I met a woman and got in a conversation with her; she is an old woman; I forget her name, and she said she had been to Tahlequah to fix up some kind of papers; I didn't ask her what kind of papers, and I told her I was going to my brother-in-law's, Than Wofford's, and she said, "I come from there this morning; I staid all
215 night there," and she said, "The men folks are not at home," and I was going there to make a trade with Than Wofford for a horse.

Q. You were horseback, were you?

A. Yes, sir.

Q. You got information from her that Than was not at home?

A. Yes, sir; Than or my brother either one was not at home. They live close together. Then I asked her where they were, and she said they were gone on Spring Creek to Jim Rowe's to a rail mauling, and I said to myself I wanted to be back in such a time; I had promised to be back, and I guess I will go and see Than at that rail mauling. She said there was going to be a dance there, and I knew that Than would not get back, and I turns then right down north from me then and got down to a road, and takes the road that goes to Jim Rowe's, and before I got to Jim Rowe's, to a man's house on one of the Batt boys place, a white man lives there by the name of Murphy, when I got along there I caught up with quite a lot of men.

Q. That is one of these Murphys that is here you speak about?

A. Yes, sir; I caught up with a lot of men riding; I could hear them; it is rocky or flinty along there, and I could hear them along ahead of me, and it seemed like several men on horses, and I kept getting nearer to them, and before I got to Jim Rowe's we all rode up together. I did not know that he was in the crowd until I saw a man getting down and having a Winchester in his hand.

Q. Who was that?

A. Stand Rowe.

Q. Had you seen Stand Rowe before that day?

A. No, sir; I did not know he was anywheres around there in that part of the country.

Q. How long since you had seen Stand Rowe?

A. It had been about 2 or 3 weeks before that I had seen him
216 at the crossing of Grand River.

Q. Were you acquainted with Stand?

A. Yes, sir; I was acquainted with him.

Q. Were you acquainted with Jim Rowe, his brother?

A. Yes, sir.

Q. You saw a man get down with a Winchester, and that attracted your attention?

A. Yes, sir. I wondered who is that; and I hitched my horse, and I walked on up and found who it was.

Q. Did you have a Winchester with you?

A. Yes, sir.

Q. Why did you carry your Winchester?

A. I was carrying my Winchester when I would go—there is nothing but trees there, you know, and it is through the wild woods, and I carried my Winchester to kill game. I was not carrying it to shoot a man with at all.

Q. Some of the witnesses here have said you were scouting; keeping away from the officers.

A. No, sir; I was not scouting; I raised a crop last summer.

Q. Did you know or have any information there was any writ out for you?

A. Yes, sir; I heard there was a whiskey writ out for me, and I staid right there at home, and said whenever they come they can get me.

Q. Did you make a practice of carrying your Winchester when you were going off that way?

A. Yes, sir; I always carried it a good deal. I was travelling once without any gun, and what made me carry one all the time, I had been over to a neighbor's house, and I saw a large panther—it can be proven by the whole settlement—I bought this gun to carry it to kill that panther.

Q. How long did you own that gun?

217 A. I owned that gun about six or eight months.

Q. Did you hunt with the gun?

A. Yes, sir; that is what I carried it for; when I went through the woods I would go preparatory to hunting.

Q. You had killed game?

A. Yes, sir; I had killed, very frequently, turkeys and sometimes a deer.

Q. Lots of deer and turkey both up in that country?
A. Yes, sir; lots of them.
Q. That is a hilly and rocky country, you say?
A. Yes, sir.
Q. What time was it you got down to Jim Rowe's?
A. I did not have any timepiece with me. I suppose, to guess at it, it would be a little after 8 o'clock.
Q. Was it after dark?
A. Yes, sir; it got dark on me quite a ways down the creek, and I rode very slow.
Q. Where did you get your dinner? Where did you eat dinner that day?
A. I did not eat any dinner. I eat at Jim Rowe's after I got there.
Q. How far had you travelled from home, the way you went to get to Jim's?
A. It must have been about 27 or 30 miles.
Q. How far did you live from Than Wofford's?
A. About 22 or 3 miles.
Q. How far is it from Than's to Jim Rowe's?
A. I suppose it must be about 12 miles.
Q. You did not go all the way up to Than's?
A. No, sir. To go to Than's I would have been going east all the time, and as it was I turned a little northeast.
Q. So you think you must have ridden as much as 27 miles?
A. Yes, sir; 27 or 30 miles.
218 Q. Did you speak to Stand Rowe when you saw him going down there?
A. Yes, sir; I told him, "Good evening," in Cherokee.
Q. You addressed him inn Cherokee?
A. Yes, sir.
Q. Did he speak English?
A. Yes, sir; he spoke English very broken; you could not hardly understand what he was saying.
Q. In your conversations with him you always spoke in Cherokee?
A. Yes, sir; that is my language, the Cherokee. I can talk a little English; not much.
Q. You talk very well in English. Who else was in the crowd that went up there that was ahead of you?
A. I could not tell you exactly who all they were. They were all scattered around, and hitched their horses, and I didn't pay any attention to who they were. Than Wofford came up just about the same time and I got in conversation with him, and walked off, and I don't know who all was right up in that crowd, and I didn't ask Stand nothing about it.
Q. You say you eat your dinner there or supper?
A. Yes, sir; Jim Rowe came to me and asked me if I had had anything to eat, and I told him that I had not.
Q. Who all eat supper with you?
A. There was several of them eat when I got there; Stand was eating, too.
Q. Stand Rowe?
A. Yes, sir.

Q. He was eating when you got there to the table?
A. Yes, sir; I went off——
Q. You went off and talked to Than Wofford first?
A. Yes, sir.
Q. There was several at the table, and among them Stand Rowe?
A. Yes, sir.
Q. Did you have any conversation with Stand Rowe?
A. Not in particular; only just talked with him; he asked me
219 how I left my folks, and I told him all right, I left them all well, and I made some remark——
Q. Just commonplace remarks?
A. Yes, sir.
Q. When did you see Jack Colvard? How long after you got there before Jack came?
A. I could not tell just exactly when Colvard did come. When I got done eating—I had left Than Wofford at the fence—I had told him I would come back to him after I eat; and I didn't dance; I never did dance in my life; and I told him I just wanted to see him, and then I told him I was going right on back that night, and he said, "No, you can go on and go home with me," and I said, "No, I am going on back down the big road," and he said, "No, you go with me," he says, "I want you to go home with me;" and I went off a little peice and talked to Than Wofford, and talked with him a long while, and when I came back they were all dancing.
Q. What did you do there that night?
A. When I cane back Jack Colvard was there; whem I got back.
Q. When you got back from talking with Than after supper Jack Colyard had come?
A. Yes, sir.
Q. Were you acquainted with Jack?
A. No, sir; that is the first time I had ever seen him in life, at that dance.
Q. Did you have any talk with him at all that night?
A. No, sir.
Q. Did you have any talk with him at any time?
A. He came to me and asked me was my name Hicks, and I told him it was, and he told me his name was Colvard, and shook hands with me, and appeared to look like a mighty fine man.
Q. Was he drinking, the'?
A. Ye', sir; he was drinking; he offered me a drink out of the bot'le.
220 Q. Seemed to be friendly with everybody?
A. Yes, sir.
Q. Did he have any whiskey?
A. Yes, sir.
Q. What did he have it in?
A. Had it in a bottle.
Q. Did he give you a drink?
A. He offered me a drink and I would not accept it, because I had once had a hemorrhage of the lungs, and I was afraid of it—I had to be doctored for it, and the doctor said I would have to keep free from drinking whiskey, and I told him that as an excuse and he excused me.

Q. Does a Cherokee take offense at a fellow when they refuse to drink with them?

A. Yes, sir.

Q. They do?

A. Yes, sir.

Q. If they are drinking?

A. Yes, sir.

Q. That is the reason you offered an excuse?

A. Yes, sir.

Q. Did he address you in Cherokée or English?

A. In Cherokee; he talked very good Cherokee.

Q. What other conversation, if any, did you have with him that night?

A. He did not talk with me very long after he excused me from drinking; about that time they called him back in the dance. I think he was kind of—in one way of saying it—he was calling off for the dance, and he said he would have to go back, and I still remained there and talked with Bill Batt, and several of them Batts, three of them Batts, and they were all drinking.

Q. They were all drinking?

A. Yes, sir.

Q. Did you see Colvard talking with Stand Rowe that night?

A. Yes, sir.

Q. Did Stand Rowe drink with him?

A. Yes, sir.

Q. Did Stand Rowe have any whiskey?

A. Yes, sir.

221 Q. What did he have his in?

A. He had it in a small jug, about half a gallon.

Q. Whereabouts was he keeping the jug?

A. I don't know where he kept it, but he went out and got it just a little while before daylight; he went and got it and he was treating everybody that would drink with him.

Q. Did Jack Colvard drink with him?

A. Yes, sir; him and Jack Colvard were drinking, and tried to force me to drink once.

Q. You would not drink?

A. I went off from him.

Q. You did not drink at all?

A. No, sir.

Q. You did not take a drink?

A. No, sir; I did not take a drink.

Q. You did not take a drink?

A. No, sir.

Q. How long had you been acquainted with Stand Rowe?

A. I have known him since I have been—I have been well acquainted with him for about 5 or 6 years; I have seen him off and on for about 10 or 11 years.

Q. He was a Cherokee?

A. Yes, sir.

Q. Did you sleep any that night?

A. No, sir; there wasn't no place to sleep there; they all set up.

Q. They did not go to bed?

A. No, sir; they were all rambling around there; it looked to me like there was something like 50 or 60 men there; the yard was a good, big yard, and it was filled mighty nigh full.

Q. Was there many of them drinking?

A. Yes, sir; there was lots of them drinking.

Q. What became of Than Wofford?

A. He went home.

Q. During the night?

A. Yes, sir.

Q. How did you happen not to go home with him?

223 A. He was drunk when he left.

Q. He got drunk and left?

A. Yes, sir.

Q. He didn't say anything to you about going?

A. No, sir; the last time he came to me and talked to me he was drunk, and I told him, I says, "You are in a terrible fix, I am going home directly;" and he said, "No, you stay here until I come back;" and 'e went off, and I heard he went home. I don't know whether he went home or not, but he never came back.

Q. He was drunk the last time he went off?

A. Yes, sir.

Q. Are you acquainted with these Downing boys that testified here?

A. Yes, sir.

Q. Were they drinking?

A. Yes, sir; I suppose so; whiskey was so plentiful there most anybody who would drink could get it.

Q. The next morning, what time did you leave there?

A. I left there between 7 and 8 o'clock.

Q. After sunup?

A. Yes, sir; in the morning.

Q. You have heard these witnesses speak about your going off in the direction of Mr. Murphy's, you and a crowd of folks, and then going up past the house again?

A. Yes, sir; I heard that.

Q. Tell us about that?

A. I suppose they must have been drunk.

Q. Did you go with that crowd?

A. I went with one crowd, but about them going towards Murphy's, I don't know anything about that; that must have occurred afterwards.

Q. You did not go, then?

A. No, sir; the way it was, them Batt boys and Jack Colvard and Stand Rowe and Mixwater started going east on the big road, and Jim Rowe, he said something—he must have been pretty well drunk, too—he remarked—

he came to me and said, "Why, Hicks, won't you take my brother

224 off?" I said, "I don't know whether I can or not." I says, "I wouldn't like to fool with him; you know how he is when he is drunk." He is a terrible man; he will shoot the best friend he has got when he is drunk.

Q. How many men has he killed?

A. Well, I don't know as he has killed—he has killed two men that I know of, and shot one all up—old Big Chuey; I expect you have heard of him.

Q. You knew the character of the man?

A. Yes, sir.

Q. You knew whe' he was drinking he was dangerous?

A. Yes, sir.

Q. Jim Rowe wanted you to take him off?

A. Yes, sir; Jim Rowe told me that the marshals wanted his brother, that the officers wanted him, and to take him off. And I said—and of course no one knows it but me and him and the old man above—I says, "I will do what I can." I says, "That man is taking him home with him." Jack was not taking me; he was taking Stand Rowe.

Q. Were you present when Jack was offering to give Stand a suit of clothes?

A. Yes, sir; I was right at them; I was standing as far as from here to you.

Q. What language were they talking?

A. They were talking Cherokee. Once in awhile, when Jack Colvard would talk awhile in Cherokee, then he would turn around and talk English; talked just about as plain——

Q. Did you hear Jack offer to give him a suit of clothes, and so oon, to go with him?

A. Yes, sir; and I thought that he had agreed, you know, and Jim insisted on me to go the way they wen' and get him if I could.

Q. Were you on your horses?

A. Yes, sir; I went off some 75 or 80 yards, I reckon, where my horse was—I had a horse I could just get down off of and throw the bridle off, and he would just feed around. I had went and got him and
225 get on him, and I thought maybe I could get the man and get him started, and I could get him away.

Q. Well, did you try?

A. Yes, sir; I went along with Jim and this here Tom Batt, and when I came up to him I just rode up to him, and I says, "Stand, I am going home, are you?" He says, "Yes." He says, "Are you going along?" and I says, "Yes," and he says, "Well, come on; let's go," and we just turned then, and they say we went through the woods; we were going a way to a trail way off just about 75 or 80 yards, a straight way to go across, to get into that same big road running down Spring Creek.

Q. How far did you go with him?

A. I went with him until we reached the top of the mountain, and when I went to Jim Rowe's I had a rope, about 40 feet of rope——

Q. What did you have the rope for?

A. To tie my horse with, graze my horse; I had loaned it to one of the Lacey boys.

Q. Which one?

A. Sam Lacey; he had borrowed it; said he wanted to tie some woman's horse with it, and I got on top of the hill, and I said, "Stand, I left my rope down here, and I will have to go back and get it," and he said, "I will be going on," and I said, "All right." I recollected about

the rope before I started, but I wanted that excuse to get away from him. I did not want to be with him at all, and I turned around and he went right on the trail, and that is the last I saw of him until——

Q. Where did you go?

A. I went back to Jim Rowe's.

Q. What did you do when you got down there?

A. I rode up and asked Switch Foreman where was Sam Lacey.

Q. What did Switch tell you?

A. He said he had gone home.

Q. Did you tell Switch what you wanted with him?

A. Yes, sir; he says, "What do you want with him?" and I
226 said, "Oh, he just borrowed a rope from me last night." I knew if he had went home there was no use of my trying to follow him up for the rope.

Q. What did you do then?

A. After I had asked him and found out what had become of him and my rope, I turned my horse right around and started back, and then taking this big road that runs down Spring Creek—I live right at the mouth of Spring Creek——

Q. Who did you start off with then?

A. I started off alone.

Q. Did you see Jack Colvard there then?

A. Yes, sir; Jack Colvard was there, about 25 or 20 steps from me. I did not get down and measure it, but just guessing at it.

Q. What was Jack doing?

A. He was setting on his horse.

Q. Did you speak to him?

A. No, sir; I did not speak to him.

Q. Did you see Joe Downing then?

A. I saw Joe Downing right out in the middle of the yard.

Q. You heard Joe Downing say you rode up where he was standing, about 5 or 6 feet, or steps, rather, from him, where he was standing in the yard, and you said to Jack Colvard, "Stand Rowe wants you; I have come for you; Stand Rowe wants to see you?"

A. Yes, sir; I heard him make that remark. I just think he must have been about the drunkest one in the crowd there.

Q. Did you hear that?

A. No, sir.

Q. Did you speak to Colvard at all?

A. No, sir.

Q. Did Stand Rowe want him?

A. No, sir.

Q. Had Stand Rowe said anything to you about him?

A. No, sir.

Q. After you left there, at any time, had Stand Rowe ever said anything to you about Colvard?

A. No, sir.

Q. Did you know whether or not they were friendly?

A. I had not heard——

227 Q. At that time you did not know but what they were friendly.

If there was anything between them you did not know it?

A. No, sir; I didn't know anything about it.

Q. He had said nothing to you about it?

A. No, sir.

Q. Did you tell him you would go back to where he was, tell Stand Rowe?

A. No, sir; I didn't tell him anything. I just said, "Well, I will be going on."

Q. Did you know which way he was going?

A. If he had kept the trail he was on, he went on down Spring Creek towards his home; we both lived down that way. I had to pass by his house to go home.

Q. If he had kept the trail he was on would he have gone down by Murphy's, where Colvard was killed?

A. He could have taken the trail that went down there.

Q. If he had kept the big road, where you went to on the hill, would that have carried him doen by Murphy's?

A. Yes, sir.

Q. About how long after you left him, do you think, until you went back; got back?

A. It was just about half a mile to where I left him, and I just rode down there and asked Switch Foreman these two or three words, and I just wheeled my horse around, and took that trail, and aimed to go right back down the big road, the way I came.

Q. Did you expect to see Stand Rowe any more?

A. No, sir; I did not want to see him any more.

Q. Did you know that he would be down there on the road?

A. No, sir.

Q. You did not know it?

A. No, sir.

Q. How far were you from Jack Colvard's, where he was standing? You say that he was there on his horse, off 20 or 25 yards from you?

228 A. Yes, sir; about 20 or 25 steps.

Q. When you left did you call him or say anything to him?

A. No, sir; I never spoke to him in any way, shape, form, or fashon.

Q. Did you see him after that?

A. Yes, sir.

Q. Where?

A. After I started off down towards Murphy's; he caught up with me; when he caught up with me he said, "Where are you going?" and I said, "I am going home," and he spoke in Cherokee.

Q. Did he speeak to you before he caught up with you?

A. I do not know whether it was him, or who it was, but there was a voice behind me, and he said, "Hold on there Hicks," and I didn't look back or pay any heed to it at all, and I just kept on. I just thought maybe it was some of the boys hollering at me, and if I stopped and looked back they would tell me to go on, and say they just wanted me to stop to see how far I had gone, or something, and I just went on until I heard the horses feet, and I looked back, and it was Jack coming.

Q. What was it Jack said to you?

A. We rode together then I reckon about 15 or 20 steps, and he says, "Uh, uh, there is Stand Rowe; I want to see that man," and I said, "You had better leave him alone." He was drinking, and he was pretty drunk.

Q. Who was?

A. Both were drunk. And he just put spurs to his horse and loped, and I kept on in a slow walk. When Jack Colvard run up to Stand, Stand drawed his gun up, or throwed it up, and I checked my horse——

Q. How close had you got to the man?

A. I had got about up in 35 or 40 steps of him, and I checked my horse, and I thinks, "Maybe I can stop that fellow; if there is not s'mething done he will shoot that man," and so I went on up then, I
229 got next to where Colvard was on the side that Colvard was facing Stand Rowe, and all the talking I done there I done in Cherokee.

Q. What was it?

A. I spoke to him, and called him, "Stand, Stand, don't you shoot," and rode right up.

Q. What did Stand do?

A. I rode up to Colvard——

Q. What did Stand do?

A. When I rode up there and told him not to shoot he stopped twice, and he lowered his gun, and he looked at me, and he says, "I ought to shoot both of you."

Q. What did Jack say?

A. And he spoke a vulgar word—

Q. Did Jack Colvard say anything?

A. He did not say anything right then; I told him, I says, "We are all friends." I says, "That looks like a good man," and I says, "I expect he is." And Jack then spoke, and he said, "I am a friend to both of you and everybody else," was the words that he said, and he took his gun off of Jack, and he says to Jack in Cherokee, he says, "You tried to lay a plan to take me." Then I says, "No, Stand; somebody is just trying to raise a fuss between you and Jack;" and he says, "No, I wouldn't do it; I am a friend of both of you." He said that again.

Q. Did he speak that in Cherokee or English?

A. He spoke it in Cherokee, and I said, "Don't shoot;" and he lowered his gun at him again, and he says in Cherokee, "Must I shoot him," and I laughed at him, and told him "No." I says, "No;" I says, "We are all friends." As they remarked I did laugh to let both boys know I had nothing against neither one of them. I was cold sober, and they were drunk. And the second time he took the gun down he commenced to pulling his horse back—we were tolerable close to him—laid his
230 gun across his lap again and pulled his horse back, and I spoke to Jack, and said, "Get away, Jack, in Cherokee, and I kept my eyes right on Stand Rowe; I didn't know after the remark that "Must I shoot you?" I didn't know what man he was going to shoot. He had his gun in his hand, and when he drawed his gun up he fired. And there was remarks made here that I pulled my hat off. I did not pull it off.

Q. They say you pulled your hat off and said, "Die like a man."

A. That must have been where the whiskey was kept; they must have been the drunkest one of the whole shooting match.

Q. You did not say that?

A. No, sir.

Q. You did laugh?

A. Yes, sir; I acknowledge the laughing. I am a man who fears God; I am a man who does not care for nothing; I will own anything if it is against me, if it is the truth I will own it. But that killing was done, and I saw it done, and Stand Rowe was the man that did the killing. I had no hand in it in any way, shape, form, or fashion.

Q. You tell us you did not know anything about Stand Rowe being mad at him?

A. No, sir; I didn't know anything about it; if they had any difficulty I didn't know it.

Q. Never had said anything to you about it?

A. No, sir.

Q. You did not know or have any reason to expect you would find him down there?

A. No, sir; I did not know he was anywheres in that part of the country at all.

Q. You did not ask him to go down there?

A. No, sir.

Q. Now, then, you say he shot him?

A. Yes, sir.

Q. What became of you and of Colvard?

A. After the shooting, and when he shot the second shot——

Q. You have not told us that he shot a second shot?

A. He shot twice. He shot at him, and then shot again; whether
231 he shot both shots at him or not I don't know. My horse jumped, and I tried to keep my eyes on him to see what he was going to do, and he throwed his gun up in the same position and he said, "Here, you take me to the road that will lead me home, or I will kill you," and he marched me on ahead of him, and I thought I either had to obey his orders or he would kill me, and I obeyed his orders.

Q. How far did you go with him?

A. I went until I take him to the road, and I went on the road about half a mile, or a little over half a mile, until he got down off of his horse, and after he got off his horse I ride on, and I left him there, and where he went to I don't know?

Q. Did you ever see him any more?

A. Yes, sir; I saw him once afterwards.

Q. How long after that?

A. The day that I came to give up. I came to the marshal to give up.

Q. What one did you give up to?

A. I gave up to a fellow named Dyer.

Q. When was that? How long after the shooting?

A. Along last fall; along in September.

Q. How come you to give up?

A. I learned from a woman that one of the deputies said that all he wanted was a sight of me.

Q. What did he want you for?

A. She said it was for murder.

Q. They wanted you for the killing of Jack Colvard?

A. Yes, sir.

Q. And you did not keep out of the way on that account?

A. No, sir; I told her that it was all right; I said, "I haven't got any gun with me, and they will have a good time shooting at me, and I rode on then on the public road.

Q. After you left Stand Rowe where did you go?

A. I went on home.

232 Q. You went on home?

A. Yes, sir; I kept the road and went on; I was on the trail at first, and I kept it until I struck the road, and I kept the road, until I got home.

Q. What time did you get home?

A. A little after dark; I do not remember now whether it was 7 or somewheres along about 7 o'clock.

Q. Where did you stay right after that?

A. I staid right at home.

Q. Did the marshals come after you?

A. No, sir.

Q. Did any one ever come to your house that you know of?

A. No, sir; if they did I did not see them.

Q. At all?

A. No, sir; they told me once when I was not at home——

Q. Who?

A. My folks told me there was some strange men there. They did not say whether they were marshals or what they were.

Q. Did you stay at home after that?

A. Yes, sir.

Q. That was last February?

A. Yes, sir.

Q. I believe you told us awhile ago you made a crop last fall?

A. I made a crop this last year.

Q. You made a crop this last year, I mean?

A. Yes, sir; last summer.

Q. What kind of crop did you make?

A. Corn.

Q. Did you plow it and work it?

A. Yes, sir.

Q. I will ask you this general question, if you remained away, laid out on the scout?

A. No, sir.

Q. Some of the witnesses have said you were scouting at the time you went over to Jim Rowe's?

A. Yes, sir.

Q. Were you?

A. No, sir; I was not.

233 Q. You say you gave up to Mr. Dyer; how did you come to give up; what did you do?

A. He came to my brothers, and I told him to go down and take my horse back——

Q. How did you get to the marshal?

A. I went to his house, and he was not at home, and I staid here until dark, and when he came back I told him my business.

Q. Had you learned that Mr. Dyer had a warrant for you?
A. I heard that he had a whiskey writ.
Q. Do you r'mber what time last fall that was?
A. It was in September.
Q. You had a commissioner's examination shortly after you were arrested, didn't you?
A. Yes, sir; right after I came down here.
Q. On the murder case first, or on the whiskey charge?
A. I was examined on the whiskey charge.
Q. What did they do with you?
A. Turned me loose.
Q. When were you arrested on this charge of murder?
A. I d'd not get away from town here.
Q. How long before you were arrested; how long after you were turned loose by t'e commissioner until you were rearrested?
A. I expect it must have been about an hour or three-quarters, somewhere there nearabouts.
Q. Where were you when you were arrested the last time for murder?
A. I was down to Frederick & Rutherford's office.
Q. We represented you in the examination on the whiskey charge, did we not.
A. Yes, sir.
Q. And you were discharged?
A. Yes, sir.
Q. At that ti'e, while you were being charged with whiskey, and being tried on that charge, did you know there was any charge
234 against you for the killing of this man?
A. I had heard of it.
Q. Had the officers told you anything about it?
A. Yes, sir; Dyer had told me about it.
Q. Dyer brought you down here?
A. Yes, sir.
Q. And you were released, and you think in an hour or two afterwards you were arrested in our office on this charge of murder?
A. Yes, sir.
Q. You have been in jail ever since?
A. Yes, sir.
Q. I believe you say you never heard Stand Rowe say anything about this man at all, Colvard, except when he was down there, when he had his gun up on him. He said, "You tried to lay a plan" to do what?
A. To arrest him. "What about that plan you laid to arrest me," he said. He spoke these words in Cherokee.
Q. You could understand Cherokee?
A. Yes, sir; that is al' I profess to talk is Cherokee.
Q. Did Jack Colvard make any reply to that?
A. He said he didn't.
Q. You do not know what plan it was that he had reference to, unless it was trying to get him to go home with him?
A. Yes, s'r.
Q. How old are you, John?
A. I am about 34 or '5 years old.

Q. Have you a family?
A. Yes, sir.
Q. A wife?
A. Yes, sir.
Q. Children?
A. Yes, sir; I have two.
Q. You have a wife and two children?
A. Yes, sir.
Q. You are a Cherokee, of course?
A. Yes, sir.
Q. Born and raised in the Cherokee Nation?
A. Yes, sir; and my parents were Cherokees.

Q. You don't know anything about what Colvard was; you had
235 never seen him before?

A. No, sir; I had never seen him before.

Q. Did you ever have any difficulty with anyone?
A. No, sir.
Q. Any fight?
A. No, sir.
Q. Were you ever charged with fighting anybody before?
A. No, sir.
Q. How long since you have drank any whiskey; you say the doctors told you you could not drink?
A. It has been, to the best of my knowledge, about somewhere about a year and six months.
Q. Before this occurrence or before now?
A. From now.
Q. At the time of this occurrence you had not quit drinking a great while then?
A. No, sir.
Q. If it had been a little over twelve months now, then it had been a little over six months since you had quit drinking?
A. Yes, sir; about six months when I had quit drinking.
Q. Had you been a bad man to drink?
A. No, sir; I never did get as bad as I have seen men—pawn their clothes or anything of that kind. Of course, if a man would meet me and give me a dram, of course I would take a dram and go along.
Q. You say you saw Stand Rowe once afterwards; where did you see him?
A. I saw him going along near the crossing of the river, close to Choteau station.
Q. What river?
A. Grand River.
Q. About how long was it afterwards, after Colvard was killed?
A. It was about five months, as near as I can guess at it; along somewheres between 4 and 5 months.
Q. Did you have any conversation with him then?
A. No, sir; I just saw him riding along; I was going this way and he was going across the road; there was a crossing of the road there, and he was going across in the other direction.

236 Q. Did you speak to him, or he to you?

A. No, sir.

Q. You never spoke to him?

A. No, sir.

Q. You never did speak to him after Jack Colvard was killed, after you left him up there on the road?

A. No, sir.

Q. He never spoke to you?

A. No, sir.

Q. You never saw him but once?

A. No, sir; that is all the time I saw him. Whether he seen me or not I do not know, but I saw him and knew him.

Q. You have been in jail ever since the 20th of September, since you were examined before the commissioner?

A. Yes, sir.

Q. You have heard since then that Stand Rowe was killed?

A. Yes, sir; it has been about two or three months ago, I reckon, or near about, since I heard it. I don't know when he was killed.

Q. Have you talked with any of your friends since you have been in jail about your case, about the evidence of the witnesses?

A. No, sir; not that I know of.

Q. How did you make out your application for witnesses? What information did you have in making it out?

A. There was a friend wrote to me.

Q. A fellow named Hughes, was it not?

A. Yes, sir.

Q. We used that for you in making out the application for the witnesses?

A. Yes, sir.

Cross-examination:

The DISTRICT ATTORNEY. Have you got that letter with you that you got from Hughes?

A. I think I have.

Mr. FREDERICK (of counsel for defense). I wrote your application for you, didn't I, over in the jail?

A. Yes, sir.

237 Q. I took the names from that letter, didn't I?

A. Yes, sir. Did you give me back the letter?

Q. I do not think I took it away.

A. I don't remember whether you gave it to me or not.

The DISTRICT ATTORNEY. It was Fayette Hughes that wrote you that letter, was it not?

A. I won't be positive who it was.

Mr. FREDERICK (of counsel for the defense). It was one of the Hughes, anyway?

[Here witness searches in his pockets for letter.]

The DISTRICT ATTORNEY. Can you find it?

A. No, sir; I can not find it in my pockets.

Q. Who was it from?

A. I won't be certain; I believe it was Al——H. L. Hughes. I think it was from him.

Q. Was Fayette Hughes at that dance that night?

A. If he was I did not see him.

Q. You have heard his brother Allen Hughes swear he was not there?

A. Yes, sir.

Q. I see in your application for witnesses that Fayette Hughes is one of the parties you ask for here to prove that you had no gun, that you had no weapon?

Mr. FREDERICK (of counsel for defense). No; not that he did not have any.

The DISTRICT ATTORNEY. Or, that you didn't use any gun, or that you did not have anything to do with the fight? You asked for Fayette Hughes, a man who was not there; how do you make that out? How did you come to do that? He is here, a witness too, is he not? [Reading.]

"By the last named six witnesses"—the last witness asked for
238 was Fayette Hughes—"defendant can show that that they were at or near Jim Rowe's when and where Jack Colvard was killed; that Stand Rowe shot Colvard, and that defendant had nothing to do in the fight; that he (defendant) used no weapons at all, and the difficulty was solely between Stand Rowe and Jack Colvard." Now, you knew when you made that application that Fayette Hughes was not there. Let me read the names of the six witnesses: Fayette Hughes is one, Switch Foreman is two, Robert Dirteater is three—is Dirteater here?

A. Yes, sir.

Q. John Goose is four, Alan Hughes is 5, and Clarke Collins is six?

A. Yes, sir; they were there.

Q. They were al' there except Fayette, were they?

A. I did not see Fayette.

Q. Were any of these parties where they could see you, or did you see any of them at the time of the shooting; any of these witnesses I have named?

A. They were at the dance.

Q. Were any of them within sight when the shooting was done by Stand Rowe?

A. No, sir; I saw them when I left.

Q. Were any of them in sight at the time of the shooting? Answer me as promptly as you answered Mr. Frederick, when he was examining you, please.

A. I don't know whether they were or not.

Q. Did you see any of them?

A. No, sir.

Q. You did not see any of them?

A. No, sir.

Q. Did the letter inform you that any of them were in sight?

A. Yes, sir.

Q. The letter written by Allen Hughes?

A. I think it did.

Q. Who did it say was in sight?

A. I do not think it called any; it called them names, there; it says, "We know enough for your benefit."

239 Q. Just simply said that?

A. Yes, sir; I suppose they were in sight; I didn't see them.

Q. You did not see them in sight, and the only thing the letter said was, "We know enough for your benefit,"—I will ask you if that letter was not written by Fayette Hughes, a man who was not there at all; if you don't know that he wrote that letter?

A. I won't be positive; if I can find my letter——

Q. You can produce that letter by Monday morning, can you not?

A. I dont know. If Frederick has left it with me it can be found; it is in the jail.

Q. Did you see the people at Murphy's house when this shootin' occurred?

A. The shooting occurred away from Jim Rowe's.

Q. I did not ask you anything about where it occurred; I asked you if you saw the people at Murphy's house at the time the shooting occurred?

A. Yes, sir.

Q. You saw them?

A. Yes, sir.

Q. How many?

A. To the best of my knowledge, about four.

Q. Did you know them?

A. No, sir.

Q. You were stranger to them, were you not?

A. Yes, sir.

Q. You were a stranger in that part of the country?

A. To that family I was——

Q. Did you know anybody else in that community—you knew Jim Rowe?

A. Yes, sir.

Q. Did you know anybody else?

A. I knew Bill Batt.

Q. You think Bill Batt was drunk when he testified you went with that crowd down the road?

A. Yes, sir; they were mighty nigh all drunk.

Q. Everbody was drunk but you?

240 A. I do not say everybody was drunk but me.

Q. You say that Bill Batt must have been the drunkest one of all the crowd, to say you went down that road with them; you say you did not go down that road and go back by the house again, didn't you?

A. Yes, sir; I say I didn't.

Q. You say you did not?

A. Yes, sir; I went down there.

Q. Which way; west?

A. Yes, sir.

Q. And came back again?

A. Yes, sir.

Q. I understood you to say you did not?

A. No, sir; I went down there and went back. I went back and went to take Stand Rowe off.

Q. What was it you said about these parties must have been very drunk who said you went down there?

A. I said the ones who said that I was going off through the woods must have been drunk, because I was going a trail; we had to go to the

forks of the road, about 40 yards from there, and to go right straight across there to get over into another trail way; there is no public roads there; there is nothing but a trail to go, horseback.

Q. Here is the way I have written your evidence down: "The witnesses must have been drunk. I didn't go towards Murphy's that morning." That is what you said and I have got it written down, and I appeal to the stenographer's report to bear me out.

A. I went down towards Murphys—when I started I went towards Murphy's.

Q. When you started where?

A. For home.

Q. I am not talking about when you started for home; when you all went down towards Murphy's and then came back and went up east?

A. Yes, sir; when I taken Stand Rowe——

241 Q. What did you go down there towards Murphy's for first and then come back again for?

A. Me and Stand Rowe started home.

Q. Why did you and Stand Rowe go down towards Murphy's and then come back again?

A. I was going to go on, which I ought to have done, but I turned back on account of Jim Rowe.

Q. You turned back on account of Jim Rowe, knowing him to be a dangerous man, and still you turned back on his account?

A. I was not afraid of Jim Rowe, but I was jubrious of Stand.

Q. You turned around on account of Jim Rowe, went up the road and when you got there you turned around and went across this way?

A. Yes, sir.

Q. Why didn't you go back the same way you started?

A. I wanted to take that man off, and not take him back by the house at all.

Q. Why not?

A. Because it was nearer to go right straight across over to the road.

Q. How did you three come to get together?

A. I taken Stand Rowe with me.

Q. What did you take him with you fir if you wanted to get Colvard away from him?

A. I wanted to get Stand Rowe away from there; Colvard was on the way to his home.

Q. You were on the way towards Colvard's?

A. No, sir; that creek runs right down by my house, by my home.

Q. But you went down the creek when you were going to Murphy's, didn't you?

A. Yes, sir.

Q. Then you came back and went up the creek, and then you turned off here going off to the right?

A. I took him right straight to the trail that runs due west. We live right due west from Jim Rowe's.

242 Q. If you go down the road west, and then go back east, and then turn off at right angles, you are not going west; if you go down west towards Murphy's 100 yards, and then go and retrace your steps 100 yards back again, and then go 100 yards further up this way in order to get back, you have to retrace, go over the same road?

A. I went kind of angling——

Q. Why didn't you go down the way you first started?

A. Because; we was not going back to the big road at all.

Q. Why not?

A. I don't know what his reason was.

Q. Why did you start to go down the big road, and then afterwards, when you were only a few hundred yards east, go off to find a trail?

A. That is the right one to go; he said he wanted to go straight through here; I don't know what his reason was.

Q. You admit you did that?

A. Yes, sir.

Q. And now you say you did go down the road towards Murphy's with that crowd. How many of you went down the road towards Murphy's, and who were they?

A. There was Bill Batt——

Q. What was he going down that way for?

A. I don't know what he went down there for.

Q. You heard Bill Batt say you all started off to get a drink; is that true?

A. I guess that is what they were doing; I wasn't along to get a drink.

Q. How many of you went down that way towards Murphy's e'rly in the morning?

A. There was Jack Colvard and Stand Rowe and Bill Batt and Eli Batt.

Q. And Mixwater?

A. No, sir; Mixwater didn't go with the crowd.

Q. You mention him as one that went down; you named the three Batts, Stand Rowe, Mixwater, Colvard, and Jim Rowe was another one, was he not? Did Jim Rowe go down with them?

243 A. I think he did.

Q. Are you certain?

A. Yes, sir; he went down.

Q. You say now that Mixwater didn't go; don't you know that he was on Colvard's horse?

A. He got on behind Colvard when they went on back; he was at the house.

Q. Don't you know that Bill Batt was at the house and got with you all?

A. He got up with him—he was there; there was a little gate there——

Q. Then that whole crowd went west towards Murphy's, didn't *th* they?

A. Yes, sir.

Q. And the whole crowd came back, did they?

A. Yes, sir.

Q. And then whatever one member of that crowd went off for, I suppose the others did, did they not?

A. I guess not; I didn't.

Q. And whatever one came back for I expect the other came back for, didn't they?

A. No; if they went down there for anything I don't know what they went off for.

Q. But you admit they did go?

A. Yes, sir.

Q. You admit the crowd went when you and Stand Rowe went, and you admit you went back with the crowd 100 yards east of the house again, went down 100 yards west, and then 100 ya'ds east; it was 100 yards east of the house you were standing when Jim Rowe had his talk with you, was it not?

A. Yes, sir.

Q. It was there at that place that he says you told him you would shoot Colvard if he didn't quit asking you fellows to go home with him?

A. There is where I say he must have been the drunkest one of the whole thing.

244 Q. Now, then, you told him there, he says—you deny it, though, I believe—that if he didn't quit asking you to go home with him you would kill him, and you say at the time of the killing that Stand Rowe charged him with putting up a job to get him arrested; then he was killed because it was thought t'at he was trying to put up a job to have somebody arrested who was on the scout; Stand was on the scout, was he not?

A. I never did learn that Stand killed him for.

A. I never did learn that Stand killed him for.

Q. You say you heard Stand ask him what he put that trap for *for*, or that job?

A. That is all the remark I heard him say to him.

Q. You heard him ask him that?

A. Yes, sir.

Q. Jim Rowe, Stand Rowe's brother, says he heard you saw if Colvard did not quit asking you fellows to go home with him you would kill him. You were afraid he was going to lay a trap to get both of you arrested, wasn't you?

A. No, sir; I was not.

Q. At any rate, it is at the place I speak of, when you all went back together, that you and Jim Rowe had this conversation over there, and from that point you and Stand Rowe and Colvard and Mixwater all started off together, going north, didn't you?

A. Going east.

Q. From that place?

A. From Jim Rowe's.

Q. Not from Jim Rowe's house. First you went west 100 yards, the crowd, and then you went east; went right back by the house 100 yards beyond Jim Rowe's, east, and it was there you had this talk, and it was there you started home, you and Stand Rowe and Colvard and Mixwater, all going together. Where was it that you and Colvard and Mixwater and Stand Rowe started to go off together?

A. Colvard and Mixwater didn't go with us at all from there, because we went straight across——

245 Q. Bill Batt says that Colvard went with you; you admit that he went part way. He says this other man went with you until you got out of sight, and afterwards he came back; that is what he said?

A. He said they went on up the road——

Q. It was at that place you turned off the road and went to the left, wasn't it?

A. Yes, sir.

Q. How far is the trail from there?

A. Well, it must be something about 60 or 70 yards.

Q. If you went to find the trail, when you struck it why did you not turn down the trail to your left and go on home about your business?

A. That is the way he did go; I went back along in my road.

Q. Why did you say you went a half a mile up on the hill?

A. I wanted him to get started.

Q. You said you went with him half a mile on the hill before you turned around and came back?

A. Yes, sir; I turned around and came back; I went that trail running out into the road between Murphy's and Jim Rowe's house. He took another trail there; there is a heap of trails that he could have taken——

Q. I am not talking about the trails that he could have taken; I am talking about the trails that were taken upon that occasion. You go half a mile to get into a trail that goes into a road 200 yards from where you started from.

A. No; I turned back and went down the road.

Q. I know you did; you turned around and came back. Now, you must be pretty hard up to get home to go half a mile away to find a trail that leads into a road 200 yards from where you started from?

A. I went down the big road when I started home; I came back to my road I had left at Jim Rowe's.

246 Q. Why did he not come back with you?

A. I didn't want him to come back.

Q. He did come back, did he not?

A. No, sir.

Q. He come down the trail, did he not? You found him at the mouth of the trail, didn't you, where the trail runs into the big road?

A. I don't know whether the trail was right there or not.

Q. You don't?

A. No, sir.

Q. You heard some of them say it was?

A. Yes, sir; I heard some of them say so.

Q. You have heard three or four men say they saw him going down the trail?

A. I don't know whether there is any trail there or not; there is one just below that.

Q. You left him half a mile away; you just thought about your rope?

A. No, sir; I thought about the rope when I left, and I thought I would take him up there a ways and leave him, and I would go back and get it.

Q. You had been with him all night?

A. I was not with him any more than I was with the rest of them.

Q. You were not with him any more than you were the rest of them when Jim came and wanted you take him away?

A. Of course I was with all of them.

Q. You had been there all night long together, and it became necessary to get him just away at that time, and after you went half a mile with him it was necessary to ride half a mile back to get a rope.

Mr. FREDERICK (of counsel for defense). You are assuming that he gives that as his reason for returning; he says he gives that as an
246½ excuse *ro* get back, and he stated that in the original examination.

The DISTRICT ATTORNEY. You say you came back to get a rope?

A. Yes, sir; I knew that the rope was there; I had loan*d*ed it to a man

Q. Who had you loan*d*ed it to?

A. I had loaned it to a man by the name of Sam Lacey.

Q. Where is Sam Lacey?

A. I don't know where he is now.

Q. Did you have him subpœnaed?

A. No, sir.

Q. Why not?

A. Because.

Q. Wasn't that very important to show what you went back to the house for, don't you think? You did not have Lacey subpœnaed at all, did you? You did not apply for him, did you?

A. No, sir.

Q. I suppose you told your attorneys about this when you were telling them about this case, didn't you?

A. I don't know whether I did or not.

Q. Why did you not tell them so important a thing as that? It seems to me that would be the very first thing you would tell them; at any rate, Lacey is not here—the man you claim had your rope—nor did you make any application for him; is there anybody here that knows that he had your rope?

A. I do not know whether there is or not, because he just stepped up to me and borrowed it from me, and I taken it and handed it to him; whether there was anybody there or not, I did not notice that; I thought I would get it in the morning.

Q. You simply made that as an excuse to get away from Stand Rowe?

A. Yes, sir; after I got him started I thought I would go on down after my rope.

Q. Did you make it an excuse to get away from him, or because you wanted your rope?

A. I d*one* it to get away from him, mostly.

247 Q. Then why did you go with him?

A. That was the excuse——

Q. Why did you go with him, then? If you wanted to get away from him why did you go with him?

A. I done it in order to favor Jim Rowe.

Q. Why didn't you let some of the others do it that was there that did not have a Winchester around with them, when there was to be a man killed? How does that happen?

A. I did not think of anybody getting killed.

Q. How did it happen that the man who had the Winchester, and a stranger almost, was selected to take him off? Was it because you had the Winchester? How close together did you and Stand Rowe live?

A. About 8 miles, 8 or 9.

Q. You knew that he was on the scout for murder, didn't you?

A. Yes, sir; I didn't know any of the facts about it, but that was the report.

Q. Why not let somebody else take him off, some of his relation', or Bill Batt, or some of the people that was down there?

A. I suppose they were scared of him, too.

Q. You are not afraid of anybody but God, I believe you say?

A. He is the one mostly that I fear.

Q. You fear nobody but God, and you were selected to take Stand Rowe off?

A. I thought I would try; I supposed he would go along with me.

Q. Tell me how many deer, panther, and turkeys you killed on that trip with that gun?

A. I don't think I killed but one turkey.

Q. Did you kill a turkey on that trip?

A. Yes, sir; close to home. When I got in about a mile. I
248 never hunted until I got close to home. I never go on a hunt when I am going somewhere.

Q. You started up the road to hunt that path, that trail, and when you got a half a mile away, as I understand you, you left Stand Rowe and came back to the house where Colvard was; is that right?

A. Yes, sir.

Q. And you found Colvard there?

A. Yes, sir.

Q. You deny speaking to him?

A. Yes, sir.

Q. You say that these Downing boys, who say you did speak to him, were the drunkest ones in the whole crowd, or they would not have said it?

A. Yes, sir; he was standing out in the middle of the yard, where they had a fire that night.

Q. The Downings were there?

A. Yes, sir.

Q. You found Colvard on horseback when you got there?

A. Yes, sir; he was standing on his horse on the north corner of the yard fence.

Q. Where was Mr. Switch Foreman?

A. He was standing on the outside of the fence.

Q. On which side of the house?

A. On the west side of the house.

Q. The side towards Murphy's?

A. Yes, sir.

Q. You heard him swear that he was standing on the north side of the house, didn't you, and not on the side towards Murphy's?

A. I think he said on the west side.

Q. At any rate, that is what you say?

A. Yes, sir; that is where he was standing.

Q. You say he was on the west side of the house, do you?

A. Yes, sir.

Q. That Switch Foreman was?

A. Yes, sir.

249 Q. Where was Colvard?

A. He was on the north corner of the yard fence.

Q. On the west or north side?

A. On the north; the north corner.

Q. Colvard was there?

A. Yes, sir.

Q. When you left, you left going down a little trail that went into the big road, didn't you?

A. Yes, sir.

Q. Colvard left, going down another trail that led to the same place?

A. He came right up behind me.

Q. On the same trail?

A. Yes, sir.

Q. How long ago had it been since you left the crowd, you and Stand Rowe, going up north, left the crowd going north—how long had it been until you came back to where Colvard was—where he was at Jim Rowe's house?

A. I suppose it might have been about a quarter of an hour; somewheres near about.

Q. Did you see anybody else out there except Switch Foreman?

A. I don't know; there was several standing around there, off a piece.

Q. You did not speak to Colvard?

A. No, sir.

Q. Did you speak to Downing?

A. No, sir.

Q. Did you speak to Switch Foreman?

A. Yes, sir; and that is all the man I spoke to.

Q. You took Stand Rowe off at the request of Jim Rowe, his brother?

A. Yes, sir.

Q. He is a blind man, Jim Rowe?

A. Yes, sir.

Q. You came back to Jim Rowe's, to where the brother had requested you to take Stand Rowe off; you had succeeded in getting Stand off half a mile. You saw a number of people standing there in the yard;
250 why didn't you speak to them, hunt up Jim, when you came to his house, and inform him what you had done with his brother; why did you come and go like a flash?

A. I wanted to get home. Stand told me he was going home.

Q. When you came back, you said nothing to anybody; you made no inquiries as to where Jim was; you were going to leave these people you had been with all night; you did not even bid them good bye, did you?

A. That was not the custom, when they were dancing, to bid one another good bye.

Q. You heard your counsel remark that, didn't you, in an undertone? Testify for yourself, please.

A. That is what I say; it is not customary.

Q. It is not customary to bid gentlemen good bye who you have been with all night. Did you get breakfast there?

A. No, sir.

Q. Where did you get breakfast?

A. I rode on down to a fellow's house by the name of Jim Smith.

Q. You had no breakfast?

A. No, sir.

Q. What were you doing there so late if you did not intend to eat breakfast there?

A. I don't know what I was doing.

Q. Until an hour or two after sunrise?

A. I was just around there.

Q. Why did you stay there; you say they were drunk?

A. Yes, sir; they were just like drunken men will be—if I would start off they would holler at me.

Q. You were sober?

A. Yes, sir.

Q. Who was it whooped as you and Colvard rode down towards——

A. I could not tell you who it was; there was a heap of whooping going on.

Q. Who was it whooped that was going down the road, you or Colvard?

251 A. I won't be positive whether it was Colvard or not; but it was somebody back behind me.

Q. There was a whoop.

A. Yes, sir.

Q. Did you hear Stand Rowe whoop?

A. I heard somebody whoop.

Q. You heard a whoop up there, and there was a response.

A. There was whooping all around; when one would whoop they would whoop some three or four hundred yards around.

Q. There was a good deal of whooping.

A. Yes, sir; there was a good deal of it all along until I left there.

Q. I am speaking of this particular time. You heard these witnesses testify that when you rode down that road that there was a whoop, and a response to that. Who was that?

A. I don't know; somebody else whooped; I don't know who it was. There was two or three whooped at that time.

Q. Two or three whooped?

A. Yes, sir; whooping all around. I heard one whoop on top of the mountain coming that way.

Q. You admit there was a good deal of whooping?

A. Yes, sir.

Q. You had gone off with Stand Rowe to find a trail; you had left him there and had gone back for your rope. You came back to the place where the dead man , who was then still alive, and you and he rode down the road together, and there is a whoop; you and Colvard start down; there is a whoop in response to that, and in a little while the man who is with you is killed. That is the way of it, is it not?

A. I don't know how long it was.

Q. You do not know who it was whooped?

A. Yes, sir; I do not know. It was not me; I know that.

Q. Of course, it was not you. I did not suppose you would whoop; you were sober.

A. Yes, sir.

252 Q. True, you were armed with a Winchester, but you only had that to shoot turkeys or panthers with. When you left with Colvard, did he say anything?

A. He asked me, "Where are you going?" I told him, "I am going home."

Q. I thought you said you did not say a word to him?

A. When he caught up with me.

Q When you left the place did he say anything?

A. No, sir.

Q. Not a word?

A. No, sir.

Q. How far was it away from there when he asked you that?

When he caught up with me, about—I didn't go there and measure it, but I guess at it—it was about 75 or 80 yards where he caught up with me at.

Q. Nothing said by you to him or him to you until he caught up with you 75 yards away from the house?

A. No, sir; not as I know of. As I said before, I heard some one holler at me, "Where are you going, Hicks?" and I never looked back to see who it was.

Q. That was as he was coming on the road?

A. That was as I left the house.

Q. 75 yards away?

A. No, sir; as I was leaving the house; was going off; some one hollered at me where I was going.

Q. You did not speak to him?

A. No, sir.

Q. You did not tell him in the presence of Swtich Foreman you were going home?

A. No, sir; until he came upon me and I looked back and saw him, and then he asked me where I was going, and I told him, "I am going home."

Q. I believe you deny what the witnesses say that you rode up and told him that Stand Rowe wanted him, wanted to see him down there, and for him to come 'long with you?

A. Yes, sir.

Q. You deny having any conversation with them at all, but you say that is not true although you admit the Downings were there?

253 A. Yes, sir; the' were there, standing in the middle of the yard at the time.

Q. Both of them?

A. Yes, sir.

Q. You got down to the place of the killing; how far did you and he ride side by side, before he rode off, said, "There is Stand Rowe"?

A. About 35 or 40 steps. I did not measure it, but to guess at it it would be about that.

Q. What was he talking to you about while he was riding along there?

A. He was not talking to me about anything; he looked to me like he was pretty drunk.

Q. Not saying anything?

A. No, sir; all he said to me was, "Where are you going."

Q. That is all he said to you?

A. Yes, sir. He said, "There is Stand Rowe; I want to see him."

Q. That is all he said?

A. And he broke towards him in a lope and left me there, left me riding along, and I never mended my gait.

Q. When you left you heard some one behind you hollo, "Where are you going, Hicks," and you made no reply, and when you got 75 yards away Colvard rode up by your side, and asked you where you were going, and you rode 35 or 40 yards together, and then he said, "Yonder is Stand Rowe; I want to see him," and that is all that was passed between you and him; is that right?

A. Yes, sir.

Q. When you got up to Stand Rowe you say you saw Stand Rowe throw his gun on him. How far away were you then?

A. It was something near on to 45 or 50 yards; somewhere along there.

Q. You were that far when he threw his gun on him?

A. Yes, sir.

254 Q. He threw his gun right on him, did he, and then took his gun down. Did you hear him say anything then?

A. He took it down when I got there.

Q. Did you hear him say anything when he raised his gun?

A. No, sir.

Q. Did you hear Colvard say anything?

A. I heard something said.

Q. What was it?

A. I heard something said just as Colvard rode up and run kind of pa*ssed* him, and as he turned his horse I heard something said, but I could not tell what it was.

Q. But you said that Colvard seen him?

A. Yes, sir.

Q. Then why would he run his horse pa*ssed* him before he stopped? Did the man say, "Hut; stop there"?

A. If he said that I didn't hear it.

Q. You say you heard him say something?

A. I heard him say something; I said I didn't know whether he said it or who said it.

Q. He turned his horse?

A. Yes, sir.

Q. If he saw Colvard when he was riding down there—if Colvard saw Stand Rowe, how does it happen that he did not stop?

A. I don't know.

Q. You do not know that?

A. No, sir; unless it was from drink, and didn't know what he was doing.

Q. You then rode up to him, before Stand Rowe took his gun down, did you?

A. Yes, sir.

Q. 35 or 40 yards?

A. Yes, sir.

Q. While he had him under the muzzle of his gun?

A. Yes, sir; he held it on him mighty near ten minutes.

Q. You walked your horse up, did you?

255 A. Yes, sir; I walked it up pretty lively.

Q. He held it on him about 10 minutes, you say?

A. Yes, sir; nearly, but I didn't have any timepiece.

Q. The first time?

A. Yes, sir.

Q. You were thirty or forty yards away, and you walked your horse up; you were not much alarmed. Why didn't you hurry up, if he thought he was going to shoot him?

A. It wasn't a very good place to hurry up.

Q. You were a man armed with a Winchester?

A. Yes, sir.

Q. You were afraid of Stand Rowe, knew his desperate character, and you saw him point the gun at the drunken man—you with a Winchester in your hand—and you quietly walked your horse up there; walked your horse up and allowed him to hold his gun on that man ten minutes, you armed with a Winchester?

A. I did not have any authority to shoot the man.

Q. But you could have gone up a little quicker, it seems to me, and stopped the killing. You walked your horse 40 or 50 yards——

A. I did mend my lick; the horse was walking along awful slow, and I made him go a little faster, spurred him up a little.

Q. You did not put him in a trot?

A. No, sir.

Q. You walked your horse up and took your position along the side of Mr. Colvard?

A. Yes, sir.

Q. Then it was that Colvard said, "I ought to kill the both of you?"

A. No, sir; Stand Rowe said that.

Q. I mean Stand Rowe. How many loads did you have in your Winchester at that time?

A. I think, as well as I remember, I had about 16.

256 Q. You stood before that desperate man with a Winchester with 16 loads in it, a man that was afraid of nobody but God, and allowed that man to th'eaten your life there and then, after he had his gun ten minutes on the other man, and never made any effort to resist or shoot, or anything of the kind to defend yourself? I suppose you found somebody you were afraid of besides your God, didn't you?

A. I could have throwed my life away, but I did not have that to do.

Q. You stood there and allowed him to threaten your life; you walked your horse up 35 yards; when he said that he ought to kill both of you, what did you say?

A. I just laughed at him and told him "No."

Q. Did you say you were the man that said, "I am the friend of both of you," or Colvard?

A. Colvard said that.

Q. I wonder why he was expressing his friendship to you?

A. I don't know, unless it was the remarks I made to Stand Rowe, "He looks like a good man; don't do that," and he throwed his eyes right over on me, and he said, "I ought to shoot both of you," and I laughed at him, and he used a vulgar word——

Q. What did he say?

A. He says, "I ought to shoot you both right in the ass'," and I laughed at him, and I says, "No, sir."

Q. That is what he said?
A. Yes, sir.
Q. Were you standing with your but's to him or your faces?
A. No, sir; I was standing with my face right to him.
Q. And yet he told you that he ought to shoot you in the ass', and you had your ass' in the opposite direction?
A. Yes, sir.
Q. How was he going to get at you?
A. No, sir; I do not know. I did not ask him anything about it.
Q. You didn't make any inquiries about that. Then he put
257 down his gun again you say, and raised his gun again?
A. Yes, sir; the second time.
Q. Then what occurred?
A. Then I said to him again—I called him by his name—said, "Stand, don't."
Q. Then he put it down again?
A. Yes, sir; he held it on him a little while and then put it down.
Q. You laughed at him again?
A. Yes, sir; when he raised it the third time——
Q. What made him raise it the third time?
A. He just commenced pulling his horse back, and——
Q. It seems that he did not have the courage to shoot the first time; what was it that gave him the courage to fire when he drew the gun up the third time?
A. I don't know.
Q. You have heard the witnesses say that at that time you took your hat off and struck your horse and said to Colvard, "Take off your hat and die like a man," and that at the end of that declaration made by you the shot was fired?
A. I never spoke that at all.
Q. You deny that?
A. I deny that entirely.
Q. If that was not what induced the man to fire after he had made two efforts, tell me what it was?
A. Well, I prevented him twice.
Q. Why not prevent him the third time?
A. I spoke to him the third time, but he fired.
Q. And you heard also Mr. Christian testify that immediately after the shooting that somebody spoke up and said, "Run on and shoot the son of a bitch again." You heard that? Who was it said that, you or him?
258 A. I did not hear that remark, and I was right there.
Q. It could not have been anybody else but you say it; the other man would not tell you to run on and kill the son of a bitch if you were a peace-maker there?
A. I didn't hear that, and I did not say it.
Q. You deny saying it?
A. Yes, sir.
Q. You heard Mr. Christian testify to it, didn't you?
A. Yes, sir; they were about 150 yards from where I was.

Q. I guess their measurement of it is better than your guess; they have stepped it, and they called it 100 yards. I guess you are kind of spreading out a little when you put it that far.

A. It looked like that far.

Mr. FREDERICK (of counsel for defense). That is a very good estimate, I think.

The DISTRICT ATTORNEY. You think it is, do you?

The WITNESS. A man would have to have mighty good lungs to talk and hear that far off.

Q. Not very good at 100 yards, would you think?

A. As far as that was—I don't know how far it was.

Q. You now put it on the ground they could not hear?

A. They could hear a man if he was whooping, or anything of that sort, but when I am talking to a man I never talk very loud.

Q. These four men who testify about your taking your hat off are not telling the truth?

A. No, sir; they are not.

Q. You didn't take your hat off, nor did you——

A. I did not pull my hat off, nor did I hit my horse.

Q. How long did you remain there before you and Stand Rowe left?

A. I suppose it must have been ten or fifteen minutes.

259 Q. You staid there until after the man fell from his horse?

A. I did not see the man fall from his horse at all.

Q. What is the reason you did not?

A. I saw the horse run, and I kept my eyes on Stand Rowe.

Q. Why didn't you get away; you were on the best horse?

A. He had his Winchester in his hand.

Q. So did you?

A. Mine was in my scabbard.

Q. You could have gotten it out, it seems to me.

A. I did not have time to get it out.

Q. Yours was in your scabbard, was it?

A. Yes, sir.

Q. My recollection is these witnesses testified you had it across your lap as you run down there with Colvard; now, how about that?

A. There is where I had the gun; if they know any better than I do, all right.

Q. They do not know any better than you do.

A. I had my gun in my scabbard; I did not have it in my lap, because I didn't carry it up there.

Q. You usually carried your gun in your scabbard, did you?

A. Yes, sir; in the scabbard or in the holster.

Q. It is not true, then, you had it across your lap?

A. No, sir; I did not carry it across my lap at all.

Q. You did not see that man fall?

A. No, sir; I did not see him fall.

Q. You kept your eyes on Stand Rowe?

A. Yes, sir.

Q. You did not put your hand on your gun?

A. No, sir.

Q. What did he say when he run off, the other man?

A. He says, "Now, you take me to the road that leads to my house; the road that I came."

260 Q. You took him; didn't he know the way?

A. I told him to go home.

Q. Did he not know the way?

A. I suppose not; he said he was lost; he was drunk.

Q. How far was he from Colvard when he shot him?

A. I suppose he must have been somewheres near 7 or 8 feet apart, or 9.

Q. He wasn't so drunk but what he could shoot a man through the heart, or nearly so?

A. He was pretty drunk.

Q. It seems to me that he ought to be able to find his way; he stopped where he could waylay this man and shoot him?

A. I don't know whether he waylaid him or not.

Q. He was waiting there for him, was he not?

A. I don't know.

Q. He was waiting there for somebody to come up; who was he waiting for?

A. I don't know who he was waiting for; I never did learn; I didn't have any conversation with him about that at any time.

Q. The last man with him, as far as we know here, was yourself; what was he waiting for there on the road; was he waiting for you?

A. He might have been.

Q. He was waiting there for somebody?

A. He might have been waiting.

Q. Did you have any agreement with him?

A. No, sir; I thought this man was done gone.

Q. You did, eh? If he was waiting for you he was not so drunk but what he knew you were going to come that road?

A. Whether he knew I was going that road or not I don't know; he never said, and I never told him anything about it.

261 Q. How far was that from the house where Jim Rowe lived?

A. I don't know; I suppose it must have been about—I won't be positive, but it must have been something over 300 yards.

Q. And it is 300 yards from there to Murphy's, is it not?

A. I don't know; I never did measure it.

Q. Isn't that about the distance, don't you think?

A. It looks like it is a little over a quarter of a mile.

Q. Then about 300 yards from Jim Rowe's house is where Stand Rowe waylaid you and him?

A. I don't know whether he was waylaying us or not.

Q. You found him there?

A. Yes, sir.

Q. Waiting for somebody, and he killed one of you?

A. Yes, sir; he killed one of us.

Q. He didn't make any threats against you when you took him up on the hill, did he?

A. No, sir; he didn't make any threats, but he kept saying that he was watching all the time.

Q. But he never made any threats against you?

A. No, sir; it was not until afterwards.

Q. It was not until you came up there with Colvard that he said he ought to kill both of you? Now, why did he say that he ought to kill both of you?

A. I don't know what caused him to say that. He was a man when he was drunk he didn't know nobody; he would shoot the best friend he had.

Q. He did not seem to shoot his best friend; he didn't shoot you. I can not find any reason for his threatening you; you give a reason for his threatening Colvard, because he thought that Colvard was trying to get him arrested. You mean to say you had your Winchester
262 along just accidentally on that day when you went to that dance 25 miles away from home, and you were not on the scout for this whiskey trial—or charge, rather?

A. No, sir; I was not on the scout.

Q. You knew that there was a whiskey case against you?

A. Yes, sir.

Q. You have heard the witnesses her' say they understood you were on the scout?

A. Yes, sir; they understood wrong.

Q. And yet you were 25 miles away from your home with a Winchester, and in company with a man that was on the scout for murder?

A. I was not in company with him more than I was in the company of the rest of them.

Q. I am pretty sure you went half a mile with him.

A. I went with him that far.

Q. How far did you go with him after the killing?

A. About half a mile or three-quarters.

Q. Did you go fast or slow?

A. We went slow.

Q. You walked your horses, didn't you?

A. Yes, sir.

Q. Turned right around from that place and deliberately walked your horses away; didn't even trot them or gallop or run them?

A. I was trying to run my horse after we got up on the hill. He got down and he says, "Wait," and I thinks I am not going to stay with him any more, and I put spurs to my horse, and I travelled away in a hurry.

Q. Did you see anybody when you were going away in a hurry?

A. No, sir; there was nothing but just a trail way leading down there, and I got to a house——

Q. To whose house? The parties are not here?

A. No, sir.

Q. I suppose you told them about that horrible killing?

A. No, sir.

263 Q. Why?

A. Because I didn't do it.

Q. You did not see the killing?

A. No, sir; I just heard him shoot. I didn't look back that way. I heard the horse run off.

Q. You did not think he was killed, did you?

A. I didn't know anything about it at all.

Q. You didn't know he was shot?

A. Yes, sir; I was satisfied that he had shot.

Q. Why didn't you tell it when you got to the house?

A. I know he shot, but I didn't know whether anybody was shot or not; I know that he shot at the man.

Q. I didn't ask you that; you just thought that he was not shot, didn't you? You didn't think he was shot at all?

A. No, sir; I didn't think that he was shot; he set on his horse when he left. I saw him turn.

Q. And you staid there, you say, ten minutes after that shooting? The people who were down 100 yards away from there saw him fall off?

A. I could have seen him if I had looked back, but I did not look back. I had a better show to see him than those folk down at the house.

Q. You were there near ten minutes?

A. Yes, sir; something nearabouts; I won't be positive it was 10 minutes. I did not have any timepiece with me.

Q. You say you have not been on the scout?

A. No, sir.

Q. You were not at home when the marshals were up there, were you? I will ask you if from the time this killing occurred up to the time you were arrested you were ever without your Winchester, if you did not carry it to the field with you?

264 A. It is very seldom——

Q. Didn't you carry it to the field?

A. I carried it to the field at one time one day. I suppose somebody has told you about that. The crows had been digging up the corn and I taken a gun along to shoot these crows with.

Q. You seem to have a good deal of necessity for a Winchester.

A. And I went plumb back to the house and got the gun.

Q. I will ask you if you always did not carry your gun when you expected there was marshals to be in the country?

A. No, sir; I never carried it for any marshals at all.

Q. You never carried it to the field but once after this killing when you were at work?

A. Only one time that I remember of.

Q. You do not remember but the one time?

A. That is all. That is all the time that I remember of carrying it.

Q. I will ask you if you ever rode away from home, or went away from home at all without you carried it with you, if on any occasion you went away without it?

A. Yes, sir.

Q. How often?

A. I think it must have been some two or three weeks I got out of cartridges. I didn't have nary cartridge.

Q. That is the reason you did not carry it. How far from your home was it you saw Stand Rowe in Grand River?

A. It was four or five miles.

Q. I will ask you if you did not have your gun with you on that occasion?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Are you sure of that?
A. I did not have it.
Q. Where was it?
A. At home. I was in a wagon. I was going over to Choteau Station.
265 Q. Is that one of the times your cartridges were out? Did you own a pistol?
A. No, sir.
Q. Is that one of the times your cartridges were out?
A. I believe I had a box of cartridges at that time. Whenever I would go to town I would never carry any arms or anything of the kind at all.
Q. When you speak about giving up, what do you mean by that? A man does not give up that is not on the scout; he just waits until they come and take him.
A. I went about 40 miles to a man's house, to an officer, and surrendered to him. That is what I mean.
Q. Why did you do it; why didn't you wait for him to come?
A. I kept hearing it whispered around that I was scouting, and I wasn't doing any such a thing. I put my hay up there——
Q. You can put up hay and be on the scout too.
A. I don't think you can very well.
Q. You deny you were on the scout at all?
A. No, sir; I was not scouting.
Q. How does it happen you were not arrested sooner, I wonder?
A. They didn't come after me.
Q. Don't you know all the papers announced your arrest, the arrest of the notorious desperado who had been on the scout for months?
A. You are liable to find anything in the papers.
Q. Didn't you see it?
A. Yes, sir; I saw it.
Q. It is strange how all of these men who are on the scout come in here, and I never saw one in my life that admitted it, in my life.
A. I saw that in the papers——
Q. This killing occurred on the 13th day of February a year ago, and you were not arrested until the following September?
266 A. I was not arrested then.
Q. I guess so.
A. I came and gave up.
Q. You are now in jail; I don't know how you can get in there without being arrested.
A. I came to a man's house and gave up to him.
Q. He arrested you then, did he not?
A. I suppose so.
Q. He put you in irons, did he not?
A. No, sir.
Q. How did you get in jail?
A. He brought me down here and put me in jail.

Redirect examination by Mr. C. J. FREDERICK:

Q. You say Dyer brought you down; how did he bring you; did you just come along with him?
A. Yes, sir.

Q. Did he handcuff you?
A. No, sir; he never had any irons on me.
Q. Did he guard you?
A. He would go off and leave me at his house after I got there.
Q. How long did you stay there after you came there?
A. Three nights and two days.
Q. He would go off and leave you there, and did that until he got ready to come down?
A. Yes, sir.
Q. He left no guard with you?
A. No, sir.
A. After he brought you down here he did not put you in jail?
A. No, sir; brought me right on to the commissioner's office.
Q. Turned you loose and you went away?
A. Yes, sir; and Mr. Rutherford made a contract with me.
Q. You were never sent to jail at all until after you were arrested for murder?
267 A. No, sir; he told me they had a writ for me for murder——
Q. He told you after you were turned loose that they had a writ for you?
A. Yes, sir.
Q. He didn't have that writ?
A. No, sir.
Q. He went afterwards to the marshal's office and got it?
A. Yes, sir.
(Witness excused.)

Here court adjourned until Monday morning, March 6th, 1893.

268 MONDAY MORNING, *March 6th*, 1893—9:00 o'clock.

Mr. FREDERICK (counsel for defendant). I desire to read the examination before the commissioner of the two Murphys, W. J. and Robert, to the jury.

The COURT. That is in contradiction?

Mr. FREDERICK. Yes, sir.

The COURT. You called their attention to that?

Mr. FREDERICK. Yes, sir.

The DISTRICT ATTORNEY. I have no objection.

The testimony before the commissioner of W. J. Murphy was then read to the jury, as follows, to wit:

UNITED STATES OF AMERICA,
Western district of Arkansas:

Before James Brizzolara, United States commissioner.

UNITED STATES
vs.
JOHN HICKS. } Murder.

(See complaint and endorsements thereon, filed herewith.)

On this 20th day of September, 1892, came the United States of America, the plaintiff in this cause, by U. S. attorney, and the defendant

in his own proper person, in custody of the marshal, and by his attorneys, Mess. Frederick & Rutherford, when the following testimony was heard and proceedings had, to wit:

W. J. Murphy, being duly sworn, deposes and says: I reside at P. O. Oaks, I. T., and know the defendant in this cause; knew
269 Jack Colbert, who is dead. There was a dance at Jim Rowe's, about 400 yards from my house, on the 13th or 12th night of February, 1892. I was at the dance in the fore part of the night. The moon was shining very bright when I got there. There was two men with Winchesters there. It was said they were Stand Rowe and the defendant; I did not know them. I staid there about an hour and a half; I went there a little after dark. A man named Christian was with me. I started for home, and as I got over the fence deceased got down off his horse. He hitched him and put his hand out and said, "Howdy," and we shook hands, and he said to me, "You ain't going to leave?" I said, "Yes; I have got to go home; my wife is by herself." I seen no arms. He begged me to stay, and I told him I could not, and I went home and went to bed. The next morning I got up a little before sunup. I heard my boy, Ben Christian, coming down the road, and they came on in a few minutes. In about half an hour my wife got breakfast about ready, and we were all setting around fire, and my wife told us to get ready for breakfast, and I stepped on the porch to wash and I heard somebody holler up sort of next to hill, and he rode down in a trail that leads to main road, and he stopped right there, and he was horseback with a Winchester lying across his lap like. He was a Cherokee. When he stopped I called to the boys and said, "Yonder is one of them desperadoes that they showed us last night." They all came out, and he sat on his horse for almost ten minutes before any one came to him. Deceased came down a little out of the road, and wheeled his horse into the road about time defendant got to him, and checked his horse up and wheeled him around facing
this first man. He was shown to me for Stand Rowe. Defendant
270 then came down and stood his horse right by the side of deceased's horse, both fronting man that was shot. They talked awhile. Defendant had a Winchester. After they talked awhile Rowe threw gun down on his lap; then they talked a little while again. Rowe pulled up his gun again and took aim again at deceased, and then put it down on his lap. Colvert said, "I am a friend to both of you." They talked awhile, and he, Rowe, pulled up the gun the third time and shot him. Colbert's horse wheeled to right, and just as horse got straight, Rowe fired again. Deceased's horse ran 114 steps and deceased fell off on right-hand side of road. I wanted to go to him. My wife was so excited that I had to wait a few moments before I could go. I then went to deceased, and just before I got to him there was Bill Batt and Eli Batt and Tom Batt, Jim Rowe, and Sursley Foreman; all got there about the same time, and they had turned him over on his back. Deceased, when I got there, drew his swallow twice. This was all the move he made. The bullet hit him right on his bosom, and they took him up to Jim Rowe's. Defendant did not do anything, only sit there on his horse. He had a gun laying on his back(?). Every time Rowe pulled gun up defendant would laugh, until Rowe shot. When deceased fell off his horse they both rode off up a hol-

low and then went up a little hill. They rode off together. Deceased had no arms. He had a belt on, but no pistol. Do not think he had even a pocketknife. Colvert lived nine miles from there. Deceased was a white man. There were two shots fired. Stand Rowe fired the shots. This was in the Cherokee Nation.

Cross-examination: Deceased looked like a white man.

271 Robert Murphy, duly sworn, says: P. O. Oaks, I. T. Knew Colbert. He is dead. Know defendant when I see him. Stand Rowe and defendant were at the dance armed with Winchesters. Heard no trouble between them and deceased. Seen them all together. They seemed to be friendly. I left dance about daylight on Feb. 12, 1892. Ben Christian was with me. I think I left before they did. I went on up home and washed my face, and was standing on porch, and I seen Stand Rowe come out of brush on a trail to big road. He was horseback. He stopped alongside of road, about 6 or 8 feet from road. He had his Winchester lying in his lap, and directly deceased and defendant came riding up the road, and they got about half way to where Ro'e was standing, and deceased left defendant and come running up to Stand Rowe. Defendant rode up to side of Jack. They all three stood there talking. Rowe pulled up gun and pointed it at Jack, and he laid it back in his lap, and he pulled it up again and laid it back in his lap the second time, and he pulled it up the third time and shot him. Defendant, every time he pulled the gun up, laughed. Jack told them he was a friend to both of them. This was before Rowe pulled his gun on deceased. When deceased was shot he wheeled his horse and ran down the road 114 steps, and as deceased wheeled Rowe shot at him the second time. Rowe and defendant stood there until Jack fell off his horse and then they turned and rode off together.

Cross-examination: I heard defendant laugh. The three were standing there talking. Deceased was in 6 or 8 feet of Rowe. Defendant was about 40 yards behind deceased when he rode up to Rowe. Defendant laughed twice.

272 During the reading of the above depositions the following occurred:

Mr. FREDERICK (of counsel for defendant). I desire to call the attention of the district attorney to this part of the examination, before the commissioner, of W. J. Murphy, where it is written that defendant had the gun laying across his back. I suppose that is a mistake.

The DISTRICT ATTORNEY. Yes; it should be that the gun was laying in front of him. That is an error, unquestionably.

Mr. FREDERICK (of counsel for defense). I now desire to offer a certified copy——

The DISTRICT ATTORNEY. I have no objection to your offering it.

Mr. FREDERICK (of counsel for defendant). This is the one that is spoken of by the witness, Mr. Whittaker.

The COURT. What is it?

Mr. FREDERICK (counsel for defendant). It is a certified copy of an application for a license made by Colvard.

The COURT. Very well.

The above-mentioned certified copy of application for a license was then read to the jury, as follows, to wit:

Application for license to trade.

To the honorable ROBERT ROSS,
National Treasurer, Tahlequah, Cherokee Nation:

The undersigned respectfully makes this application under sec-
273 tions 12 and 13, page 251–2, compiled laws of the Cherokee Nation, for license to transact until the close of the next session of the national council, a mercantile business in the Cherokee Nation, neighborhood of Court House Rose Preney and District of Saline, by selling and offering for sale, goods of the following general description, to-wit: General merchandise under the name and style of A. J. Colvard & Co., composed of A. J. Colvard, J. E. Whittaker; and in compliance with said law hereby make affidavit that the undersigned recognized and undoubted citizens of this Nation, and that the signatures of every person making this application for license to trade be appended to this application, and that this application and facts stated and contains therein are true as alleged and presented.

(Signed) A. J. COLVARD,
J. E. WHITTAKER.

Sworn to and subscribed before me, on this the 1st day of May, 1890.

[SEAL.] (Signed) W. T. WHITTAKER,
Dept. Clerk of Cooweskoowe Dist.

I certify that the above is a true copy of the original application of A. J. Colvard and be now on file in the Treasury Department.

Given under my hand and seal of office this the 21st day of February, 1893.

(Signed) E. E. STARR,
Treasurer C. N.

Defense rests.

274 The United States then introduced by way of rebuttal the following named witnesses: William J. Murphy, S. J. Christian, Robert Murphy, Ben Christian, who testified as follows:

275 *Testimony offered by the Government in rebuttal.*

WILLIAM J. MURPHY, having been recalled in rebuttal by the Government, was examined by the district attorney, Mr. W. H. H. *H.* Clayton, and testified as follows, to wit:

Question. You have been on the stand before?

Answer. Yes, sir.

Q. You stated that you saw the defendant, Hicks, ride up to the place where Colvard was standing just before he was shot—when he was facing Stand Rowe?

A. Yes, sir.

Q. Please state if you observed his gun at that time?

A. It looked to me like he had a Winchester lying in front of him, across his lap in front of him.

Q. It was not laying in a scabbard, but laying in front of him?
A. Yes, sir.
Q. I notice the commissioner has made you say that he had the gun laying on his back?
A. He has made a mistake in putting it down, I reckon. It was laying in his lap.
Q. That is what you stated before the commissioner?
A. Yes, sir; that is just what I said there.
Q. Please state if at the time the shooting occurred he still had his gun, or had he put it up?
A. He had his gun when he rode off. He taken his gun in his hand when they rode off together.
Q. And it was not in its scabbard?
A. No, sir.

Cross-examination:

A JUROR. You say they rode off together?
A. Yes, sir.
Q. What do you mean by that; one in front of the other?
276 A. No, sir; they rode off side by side. The man that done the killing or shooting and Mr. Hicks rode off side and side together.
Mr. FREDERICK (of counsel for defense). Which one had the gun in his hand?
A. They both had their guns.
Q. In their hands?
A. Yes, sir; they both had them in their hands at the time they rode off.
Q. When did Hicks take his in his hands?
A. Well, I never noticed him having it in his hand until he started off—started to ride off. How come me to notice that I had got out in the yard, and my wife begged me not to go, to come back, they might shoot me, and I turned around then and stepped back on the porch, and I taken the second thought when I looked and turned around and stepped back on the porch——
Q. Which was the nearest to you?
A. Rowe was next to my house.
Q. He had his gun in his hand; one hand or both hands?
A. One hand.
Q. Down by his side, or across his lap?
A. Sort of on his thigh like.
Q. How did the other man have his gun?
A. He had his in his hand—sort of on his lap—as well as I could see.
Q. Have it on the side from you?
A. Yes, sir; had it kind of sticking up like; I suppose he had it resting against his horse or leg, or something that way.
Q. You have seen them have scabbards coming down by the side that way?
A. Yes, sir; I have seen scabbards.
Q. If it had been in a scabbard it might be that it was sticking up that way?
A. No, sir; the muzzle of the gun looked like it was up.

Q. You were 100 yards away from him? You could not be
277 certain about that, could you?

A. I believe I could tell the muzzle of the gun from the butt of the gun at that distance.

A. I believe I could tell the muzzle of the gun from the butt of the gun at that distance.

Q. I know you could, if your attention was called to it.

A. My attention was right smartly called to it.

Q. If a man has a gun, why would you look at one end, or for one end of it more than you would look for another?

A. If the dangerous end of it is towards me——

Q. 'hat is a fine argument for a man to make.

A. I believe I could tell which end it was.

Q. I am not disputing that; I am asking you the question whether or not you did do it?

A. I think I did. Yes, sir; I think the muzzle of the gun was up.

Q. Rowe was between you and him.

A. Of course they were riding off kind of in an angle from me from where I was standing.

Q. Directly from you?

A. No, sir; a little angling.

Q. Rowe was closest to you?

A. Yes, sir.

Q. The other man was furthest from you?

A. Yes, sir.

Q. And his gun, was it in his right or left hand?

A. I think it was in his right hand.

Q. You just think so; you just suppose that, don't you? Could you state for certain?

A. No, sir; I could not state for certain which hand it was in.

Q. But on up to the time of the killing the gun was lying across his lap?

A. Yes, sir.

Q. You d'd not see him draw his gun?

A. No, sir; I didn't. I didn't see him shoot.

Q. You saw them ride off together; that is, side and side?

A. Yes, sir; you might say riding side and side.

278 Redirect examination:

The DISTRICT ATTORNEY. You are certain that the gun was laying in his lap as he rode up there?

A. Yes, sir.

Q. And as they rode off they both held their guns in the same position, you think.

A. Yes, sir; something near.

Recross-examination by Mr. C. J. FREDERICK:

Q. Why didn't you tell that Saturday?

A. You never asked me that question Saturday.

Q. It is not mentioned in the commissioner's papers.

A. I kno' I told it that way.

Q. Do you suppose there is anything else you have not told us about?

A. No, sir.

Q. This is the third time you have been on the stand.
A. Yes, sir.
Q. If you think of anything more, tell it.
A. I do not think of anything more.
(Witness excused.)

279 S. J. CHRISTIAN, having been recalle' by the Government in rebut'al, was examined by the district attorney, and testified as follows, to wit:

Question. Your name is S. J. Christian?
Answer. Yes, sir.
Q. I believe you were the first witness on the stand in this case?
A. Yes, sir.
Q. I don't know whether you stated or not, but I will ask you again, when you saw the defendant riding down the road towards Murphy's just before the killing, hid he have a gun?
A. Yes, sir.
Q. How did he carry it?
A. It was laying in his lap before him.
Q. Laying across his lap?
A. Yes, sir.
Q. In front of him?
A. Yes, sir.
Q. Did you see his gun in his scabbard at any time?
A. No, sir.

Cross-examination:

Mr. C. J. FREDERICK. You never saw the gun in the scabbard?
A. No, sir.
Q. Are you certain that his gun was not in his scabbard when you saw him down there?
A. If it had been in the scabbard I could not see the gun. It was the gun that I seen laying in his lap when he rode off that way.
280 Q. You could only just see the general outlines of the gun at that distance?
A. Yes, sir.
Q. Are you certain that the gun was not in the scabbard when you saw it?
A. Yes, sir; I am certain of it.
Q. You are certain of that.
A. Yes, sir.
Q. You examined that very minutely. Did you tell us anything about that when you were on the stand last week?
A. I told him about him having his gun in his lap.
Q. Did you tell us anything about his not having it in the scabbard?
A. I don't remember; I think not.
Q. Did you tell us that he had it in his lap when you were on the stand before?
A. Yes, sir.
Q. Are you sure of that?

A. I am pretty certain I did. If I am not mistaken, I did.
Q. You are not certain about it then?
A. Yes, sir; I think I am certain that I told you that?
Q. You want it understood you were certain that you said that he had the gun laying in his lap, shall we take it that way?
A. I don't know; I might be mistaken.
Q. You might be mistaken?
A. Yes, sir; I don't know for certain; I think I did.
Q. If you can not be certain, if you can not remember what you testified to two or three days ago, might you not be mistaken about the gun being in his lap; might it not have been in the scabbard?
A. I saw the gun very completely when he rode off.
Q. As he rode off he had it in his lap?
A. Yes, sir; as he came up, too.
Q. You noticed that particularly. You noticed that he rode off with it still in his lap?
A. Yes, sir.
281 Q. Lying across in front of him?
A. Yes, sir.
Q. Has your attention been called to this since you testified before, to this point?
A. No, sir.
Q. It has not been called to your attention this morning before you came on the stand?
A. I believe Mr. Clayton (the district attorney) asked me something about it.
Q. Your testimony is this, then: That you saw him ride up, and he 'ad the gun laying across his lap?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir.
Q. When he rode off he still had the gun, as he rode off?
A. Yes, sir.
Q. How did the other man Rowe have his gun when he rode off?
A. He had it right down——
Q. Had it across his lap?
A. Yes, sir.
(Witness excused.)

282 ROBERT MURPHY, having been recalled upon behalf of the Government in rebuttal, was examined by the district attorney, and testified as follows, to wit:

Question. You have been on the stand heretofore in this case?
Answer. Yes, sir.
Q. You were at your father's house at the time this killing occurred?
A. Yes, sir.
Q. When you saw the defendant ride up to the place of the killing, did you observe whether he had a gun or not?
A. Yes, sir.
Q. How did he carry the gun?

A. Had it lying across his lap.
Q. Did you see it in the scabbard at any time?
A. No, sir.

Cross-examination by Mr. C. J. FREDERICK:

How did he carry it off as he went away?
A. He had it in his lap as he went off.
(Witness excused.)

283 BEN CHRISTIAN, having been recalled by the Government in rebuttal, was examined by the district attorney, and testified as follows, to wit:

Question. Your name is Benjamin Christian?
Answer. Yes, sir.
Q. You have been on the stand heretofore in this case?
A. Yes, sir.
Q. You were at Murphy's house on the morning of the killing?
A. Yes, sir.
Q. You saw the defendant as he rode up to where Stand Rowe and the deceased were?
A. Yes, sir.
Q. Did he have a gun?
A. Yes, sir.
Q. How did he have it?
A. Laying across his lap.

Cross-examination:

Mr. C. J. FREDERICK. How did he go off with it?
A. Lying across his lap, between him and the saddle.
Q. Are you sure of that?
A. Yes, sir.
Q. You are certain that he came up with it across his lap, and you are equally certain that he rode off with it that way?
A. Yes, sir.
(Witness excused.)

284 This was all the evidence in the case.
The court then charged the jury as follows:

285 In the circuit court of the United States, within and for the western district of Arkansas, February term, 1893.

UNITED STATES } Murder.
vs.
JOHN HICKS. }

Charge of the court, delivered March 7th, 1893, 9:00 o'clock a. m.

PARKER, J.

Gentlemen, the defendants stands before you charged with the crime of murder; for having, in connection with Stand Rowe, on the 13th day of February, 1892, in the Cherokee Nation, taken the life of Andrew J. Colvard by shooting him with a gun, and because this act of shooting with the gun was done willfully and with malice aforethought.

You have heard the evidence in the case, and from that testimony you are required to find what connection with that killing this defendant had, if any. You will be told, in the course of the charge, how a man may connect himself with a crime so as to be responsible for it, though he may not with his own hands have committed that crime.

There are various questions of law involved in this case, and upon these questions it becomes the duty of the court to give you the principles
286 of the law. First, we have the question of jurisdiction. Then we have the question as to whether a crime has been committed. Then we have the additional question as to whether or not this defendant is responsible for that crime. We will take these propositions in their order and as briefly as possible, and as plainly as we can, state the principles of the law bearing upon them, leaving it to you, as it is your duty, to find what the truth of the case is from the facts, from the testimony offered before you. First, then, we proceed to the question of jurisdiction; that is, the right to try this case by this tribunal, made up of the court and jury. Jurisdiction means the right to hear and determine a case. That involves the consideration, first, of the place where the crime was committed. It is alleged it was committed in the Cherokee Nation. If the proof shows that, this court, for the commission of such a crime as is charged in this indictment, has jurisdiction over that place; the right to hear and determine a case of that character. The next question involved in jurisdiction requires us to consider the person committing the crime, and the one upon whom it is committed, for you will understand in this jurisdiction it is not as it is in the State courts. In the States it matters not who may commit a crime and upon whom it is committed, for they have a right to hear and determine all cases occurring within their limits. You will understand that this matter of citizenship, when we talk about it in courts, means jurisdictional citizenship; that is, the question as to whether or not the party is under the protection of the laws of the United States, and is subject to its laws if he violates them, and the punishment following such violation.
287 If he is under them and is a jurisdictional citizen he is entitled to their protection. There is no controversy in this case over the fact that the defendant is an Indian. It is admitted on both sides that he belongs to the race of people named Indians. Under the law organizing the jurisdiction of this court over that part of the country, called the Indian country, attached to the district, if a crime is committed by a white man—and by that expression is meant a citizen of the United States—upon an Indian, that crime is subject to trial in this court, if it occurs in the territory within the geographical jurisdiction of the court. The converse of that rule is tr'e—that is to say, if a crime is committed by an Indian upon a white man—that is, upon a citizen of the United States, one who is under the protection of the laws of the United States—this court has a right to hear and determine the case; or, in other words, it has jurisdiction. It is claimed upon the part of the Government that Andrew J. Colvard was a jurisdictional citizen of the United States in his lifetime, and that although the defendant may be an Indian, under the law that I have just called your attention to, the court has a right to hear and determine the case. It becomes necessary, therefore, in this connection, that we should look at the status of Andrew J. Colvard that we may know what relation he bore to the Government of the United States and the laws of the United States. It is not

denied and the proof beyond controversy shows that he belonged to the Saxon race by blood, or that he was a white man. It shows also that he was a man who was married to a woman who claimed to be a Cherokee Indian woman, and that this marriage took place in the State of
288 North Carolina. There are no people in North Carolina called Cherokee Indians who have such a status, or as such exist under the law as that white men become Indians by marriage to one of that people.

There are people living in that State who are Cherokees by blood, but they have become citizens of the State of North Carolina; they are entitled to the rights of citizenship under the laws of that State, and they are subject to the duties devolving upon citizens of that State, and, being citizens of that State, they are citizens of the Unite' States—at least, they are jurisdictional citizens of the United States. They might not be full political citizens and yet be political citizens of the State, as is the case in this State with a foreigner, who may vote after a residence of one year after he has declared his intention of becoming a citizen, although he has not been naturalized, yet that does not make him a full political citizen of the United States. The Cherokee people living in North Carolina have ceased to be a part of the Cherokee people living in the Cherokee Nation in the Indian country. They have become citizens of that State, and there is no law in North Caroline which would make Andrew J. Colvard a Cherokee Indian because he married a Cherokee woman. On the contrary, the law of North Carolina makes a marriage of that kind a nullity. There is a law in that State forbidding marriages between whites and Indians and whites and colored people. Now, upon the question as to the status of that people there, the Supreme Court of the United States in a case called The Cherokee Trust Fund, has held that these people called Cherokee Indians in North Carolina are citizens of that State, and bound by its laws. The Cherokee Nation has a right, under the constitution and laws that govern
289 it, under the autonomy that they possess, to make such regulations as it pleases by which white men can change their nationality, can denationalize themselves as citizens of the United States and nationalize themselves as citizens of the Cherokee Nation. They have a right, as settled by the Supreme Court of the United States, to declare who are entitled to the rights of citizenship in their nation. While they are not a full State in the proper and correct acceptation of that word, they have such a status in that direction as that they have that right, under the treaties made with the United States, and they consequently have a right to prescribe the laws governing marriages between their own people by blood and citizens of the United States or aliens. And before a man can become a citizen of the Cherokee Nation by adoption so as to divest a court of the United States of jurisdiction over him, or from the person who may injure him in his rights, the proof must show in the case a strict compliance with the marriage laws of that country. This right that a man who is an outsider, as it may be termed, or a noncitizen of that country obtains by becoming a citizen is one of great magnitude, for he becomes a participant in all their funds; he becomes joint owner in their lands when they may be divided; he is not burdened by any taxation, because they do not levy taxes, and he depreciates by just one the amount of funds, the amount of lands, that may belong to their people. And the

right that he may obtain is a right of such high character that they have undertaken by laws, proper in spirit and letter, to guard their interests and their rights that the bounty which belongs to them as a nation by
290 blood may not be frittered away by other persons who might come in there and take it away from them. The laws regulating the method of becoming adopted citizens of that country should be rigidly construed and rigidly applied.

All persons before they can expatriate themselves as citizens of the United States, and become citizens of that nation, must strictly comply with their laws. Now, although it may be true that Colvard married a woman who had Cherokee blood in her veins, and married her in North Carolina, that does not make him a citizen of the Cherokee Nation, Indian country, by adoption. He had no rights there because of such marriage, any more than if he had married a white woman in North Carolina. He might become adopted if he had married a white woman, if they saw proper to adopt him. He might become a citizen by an act of their council, or they might do it under a general law prescribed by them; but when he occupied such a position the proof must show a strict compliance with the rules prescribing the method to be adopted to secure adoption in that nation. If the proof in this case shows that this man was a white man by blood, that makes a prima facie case of jurisdiction; it makes a case of jurisdiction that the Government may rest upon until it is overthrown by evidence offered upon the other side, because all white men, as a rule, in this country, are jurisdictional citizens of the United States, and the exception to the rule is a state of case that is to be established as an exception to it, and not as a rule. Now, there is a method by which a man can become a member of the Cherokee Nation by adoption, and it becomes necessary to refer to their statute upon that subject, and it is neces-
291 sary that you should see that the proof shows a strict compliance with that statute on the part of Colvard before he became a citizen of that country. The Cherokee law enacted upon that subject is:

"Whereas the peace and prosperity of the Cherokee people require that, in the enforcement of the laws, jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within the territorial limits of this Nation, therefore every white man or citizen of the United States, or of any foreign state or government, desiring to marry a Cherokee, Shawnee, or Deleware woman, citizen of the Nation, shall be, and is hereby, required to obtain a license for the same from any of the district clerks of the several districts, and make oath or satisfactory showing to such clerk that he has not a surviving wife from whom he has not been lawfully divorced; and unless such information be freely furnished to the satisfaction of the clerk, no license shall issue.

"SEC. 68. Every white man or person applying for license, as provided in the preceeding section of this act, shall, before obtaining the same, be required to present to said clerk a certificate of good moral character, signed by at least ten (10) respectable Cherokee citizens by blood, who shall have been acquainted with him at least six months immediately preceding the signing of such certificate."

"SEC. 69. Before any license as herein provided shall be issued, the person applying shall be, and is hereby, required to pay to the clerk to

whom application is made the sum of five dollars, and be also required to take the following oath:

"I do solemnly swear that I will honor, defend, and submit to
292 the constitution and laws of the Cherokee Nation, and will neither claim, nor seek, from the United States, or any other government, or from the judicial tribunals thereof, any protection, privilege, or redress incompatible with the same, as guaranteed to the Cherokee Nation by the United States in treaty stipulations entered into between them, so help me God.

"SEC. 70. Marriages contracted under the provisions of this act shall be solemnized as provided by the laws of this nation, or otherwise shall be null and void.

"SEC. 71. No marriage between a citizen of the United States or of any foreign nation and a female citizen of this nation, entered into within the limits of this nation, except as hereinbefore authorized and provided for, shall be legal." * * *

Now, that is what must be done before a legal marriage can take place in the Cherokee Nation, by which a man may become a citizen of the nation by adoption so as to deprive the courts of the United States of jurisdiction over him. You are to look to the testimony in this case to see if there was any evidence of a marriage in that nation. This marriage in North Carolina between Colvard and his wife did not make him a citizen of the nation, because the Indian people of the State of North Carolina are not a part of the Cherokee Nation, and before they can become a part of it they must be adopted by it, they must come in under some law adopting them. Now, then, you are to see what the status of Andrew J. Colvard was in the light of this evidence before you, and in the light of the law I have given you, telling you what it takes to make a man a citizen of that nation. You are to see whether or not he was recognized as a voter there; though the
293 fact of his being a voter, while it may be some evidence, is not conclusive, because he might be recognized as a voter and be a fraudulent voter. It often happens in communities that men do fraudulent acts of that kind. You are to look at his status there as recognized by the community of people, because that is to be taken into account to show what his condition was. If you believe that the evidence shows that, although he was married in North Carolina to a woman who had Cherokee blood in her veins, but he was never married to her under the laws of the Cherokee Nation, that marriage would not make him a citizen of the Cherokee Nation, if he was a white man by blood. It becomes necessary, then, to make him a citizen of the Cherokee Nation to show that he become such a citizen by some other means than by marriage, as, for instance, adoption by the council of the nation, or something of that kind. If that has not been shown in the case, the fact of his being a white man, and not having been married under the laws of the Cherokee Nation, would leave him as a jurisdictional citizen of the United States, and although this defendant may be an Indian by blood this court would have a right to hear and determine the case as against the defendant upon the charge of having taken the life of Andrew J. Colvard.

That I conceive to be sufficient upon the question of jurisdiction.

We now come to the nature of this charge and what is necessary to be found in order to authorize you to say that the crime of murder has been

committed. That is the first proposition to be found in every case of this character—that is, whether or not a crime has been committed such
294 as is charged—that is called the corpus delicti—the fact that the man named in the indictment as having been killed has been killed, the fact that he was killed criminally, the fact that he was killed by the means named in the indictment. In pursuance of that method of finding out what elements enter into this offense, the first inquiry to be made by you and to be answered by this testimony is whether or not Andrew J. Colvard is dead. That is the first proposition. You take the evidence in the case and by that you ascertain whether this proposition exists or not. You can have no possible trouble upon that score, because it is not controverted and because all the proof offered upon both sides of the case tends to show the fact of his death. That being true you may safely put that proposition aside as one established, and established to that high degree of certainty that the law requires it; that is, beyond a reasonable doubt.

Now, the second proposition necessary to be established is that Andrew J. Colvard died from the violence of the character named in the indictment—that is, he was shot with a gun, and the wound this inflicted produced his death. You take the facts, and you find out that he was shot with a gun, as is charged in the indictment. The proof must show it was a gun, or some kindred weapon. They use the term "gun" for pistol out in this Western country; they call them all guns, frequently, these men who are most conversant with handling them in desperate encounters, and I do not know but that the term is correct; it is an expression covering all weapons that inflict violence in a certain way. Thus it is that the law recognizes that as a fact—that is to say, if it is charged in the in-
295 dictment that a man kills another by shooting him with a gun, and it turns out it was what we commonly call a pistol, that is recognized in the law as a gun; it is a kindred weapon. There is no controversy over the character of the weapon used in this case; nobody disputes that. You have proof—called positive proof—of that fact, positive proof going to show what it was that was used with which to do the shooting, positive proof showing that it was a Winchester gun that was used in the killing of this man. Now you are to find out whether Andrew J. Colvard died from the effect of a wound inflicted by that means—and, of course, you can only find it by inference. If he received a wound that would ordinarily and naturally produce death, and he died shortly thereafter, you may take these facts as sufficiently conclusive to lead you, as reasonable men, to the conclusion that he produced the deadly result, because the using of a gun usually has that effect, and because usually reasonable men would come to a like conclusion from such evidence. Therefore, if that state of case is proven by the evidence, you may lay that proposition aside in your mind as one established to that degree of certainty required by the law beyond a reasonable doubt.

Now, let us see what the third element is that enters into this crime as charged. It is, that this gun was used wilfully and with malice aforethought which produced this deadly result; or, to state it in shorter form, that the man Andrew J. Colvard was killed wilfully and with malice aforethought. The former is the better expression, because that is what is really meant by the existence of willfully and with malice aforethought;

that is to say, that the act which produced the deadly result was an
296 act accompanied with wilfulness, and accompanied with this ingredient of murder called malice aforethought. Now, we are required to pause here and give you the legal definition of this expression willfully and the phrase malice aforethought, because they have meanings which are different from expressions of like character as they are ordinarily used. For instance, the word "willful," as ordinarily used, means when there has been a purpose and a specific design to produce exactly the result produced. The expression in the law is more comprehensive than that, as you will learn presently. The word "malice," in ordinary acceptation, is narrower than when it is used in the law; it is not so comprehensive, because it means the execution of a specific design. A man may have hatred or ill will or animosity against another, and he takes his life because of that; that is a case where malice aforethought grows out of a specific condition, but the expression as used in the law, while it comprehends that condition, comprehends others also, because it may grow out of a state of case where there is general depravity of mind, where there is general recklessness of purpose, where there is general malevolence of heart, so that he who possesses such mind and heart becomes regardless of his social duty, and he has a mind fatally bent upon mischief towards his fellows. That is called general malevolence, one condition which germinates malice aforethought. But let us proceed to the legal definition, first of willful, and then of malice aforethought. Now, it no doubt becomes as tiresome to you as it does to me to have to repeat this definition in every one of these cases, and especially when we have so
297 many cases of this character, but it is necessary. We can not try these cases on the law given in other cases tried last week or last month. Every case must have the full complement of legal principles that are involved in it given to you in the language of the law, and in such a way as that you may fully comprehend them and understand them. Now, it is a common belief that there is some great mystery underlying the law. It is a blessed consideration in this day that great progress has been made in that science, so as to clear away this mystery attached in former times, so that every man of ordinary intelligence, so that every man of ordinary information, can understand these expressions in their comprehensiveness and in their simplicity when they are given to a jury as they ought to be given, in plain, distinct, concise, and comprehensive language, so your minds may grasp them; and that is what the law contemplates, and that is why sometimes we give these expressions in different forms, because there are twelve minds that must come to the same conclusion, and these minds may be reached by different avenues by putting the same idea, the same proposition in different attire, clothing it in different ways, just as the great truths that govern our happiness here and hereafter reach the minds of men necessarily by different methods, by different creeds, if you please.

Now, the word willful as used in connection with this charge in this indictment means an intentional killing, and not an accidental killing. It means, in other words, an act which results in death that is intentionally done, and one that is not accidentally done. You take an act that ordinarily or naturally or reasonably would produce death, and you are only

required to investigate far enough to see that the act was done pur-
298 posely or intentionally, and, consequently, willfully, and whenever you find that an act of that kind was done in that way, you have already arrived at the conclusion that the result was an intentional result, because by the principle of the law, which is in the interest of innocent human life and its protection, every man is held to have intended and contemplated the necessary, natural, or probable results of the act he does. Now, that is a proposition of the law that is founded upon the usual course of conduct, just as all these principles of the law are so founded. You see a man out here shoot at another, and you see the man shot at fall dead; you do not stop to inquire whether the man doing the shooting intended to kill the other or not, to hunt up specific reasons for that purpose; you go along and summon an officer, or you seek to arrest the man yourself, acting under the full belief of the well-established conclusion in your minds that here is a state of case which you judge by the light of the conduct of the party, and the act done, whether he intended to kill. That is exactly what the law says you must do here, where a man points a deadly weapon at another and he sends the missile of death into the vitals of that other; you have presented such conduct and such acti'ns a' to show that the act which he did was a willful act. You know that by the light of the circumstances attending that act, and when you know that in that way you necessarily know that he intended the death, because it follows as a necessary result. Now, you may consider that that may be found in that way, and it is a reasonable way to find it, because you take this act of shooting by Stand Rowe, he being the man who it is said did the killing with his own hand, presented the gun, and pulled the trigger
299 that sent the deadly ball into the vitals of Andrew J. Colvard; when you find that act of presentation and that act of lowering that weapon, as it was shown to have been lowered, that he presented it and lowered it the second time, and finally presented it and fired it, and then presented it and fired it again, you have the concurrence of acts which show willfulness upon the part of the agency that governed and controlled that deadly weapon; and by the light of these attendant facts, such as the presentation of the gun and the pulling of the trigger, you have that which shows a willful act, a deadly act, an act deadly in its results, an act possessing such a known connection between itself and the deadly result that the conclusion from the act, if it was willful, necessarily follows that the death was willful. Now, it becomes easy to find that—but right here it becomes necessary to give one admonition, and it is this, that every fact to be found by you in every case that you try can be found only by one or two classes of evidence, either by positive testimony or by circumstances. There are two propositions in this case which can only be found by circumstantial evidence; and if you can not use that sort of testimony to satisfy your minds of the correctness of the 'roposition asserted by the Government, then all the power upon the part of the law ceases; there is no longer any protecting agency connected with it, because it is incapable of being enforced. That the act was done willfully, and that it was done with malice aforethought, are two propositions that necessarily must be established alone by circumstantial evidence. Now, as to the fact that this man was shot, and that he was shot with a Winches-
300 ter gun, that the gun was held in a certain position, and that it was in the hands of a certain man, you have what is called ocular

proof of it; the statements of men who saw it with their own eyes, that is positive evidence. The fact you are hunting for as involved in that proposition is the fact of shooting. That was seen. That is proven by that sort of evidence, because the evidence of the fact is the very fact itself. Now, positive evidence comprehends that, and it comprehends a little more than that. When it is so near to the fact itself as to demonstrate it, or prove it beyond reasonable doubt, by the application of any one of the five senses to the fact, to the observation of it, it is a positive fact; but there, of course, positive evidence ceases; it can no long'r have any existence alone, because when you come to find what was the condition of the mind of these parties, Stand Rowe and this defendant, you can only fathom that by the light of one class of evidence, and that is circumstantial evidence, because you can not apply in a positive way any one of the five sense' to a mental condition. The condition of the mind is a thing that is known alone to that mind, to its possessor, and to its Creator. We can only find it shadowed forth by the light of the surrounding circumstances. But the law says that is a reasonable method of coming to a conclusion. The law says that recognizing the fact that the great mass of important conclusions that men must arrive at in this world are based alone upon that sort of evidence, and that no matter of business of importance, no matter of any great concern, can transpire in this life that is to be recognized as a fact, that is to be believed and acted upon, unless we rely upon this sort of evidence to establish it.

301 Now, if you take that which is shadowed forth by the acts of a man you have that which shows his mental condition. It may be *sh* shown by acts which are signs of a mental condition, or it may be shown by words which are likewise signs of a mental condition. A man uses speech, uttering not the idea itself, but the sign of it, that you can hear and comprehend the idea when you hear that sign, just as you can comprehend the idea when you look at a certain facial expression, or you see a certain gesture, which is a sign made not by words, but by acts. They are that indicia of mental condition, and we can never tell what a man is thinking unless we can see some evidence of that thought as shown by his words, by his speech, by his language in the shape of words, or by his actions or signs made by him, and it becomes especially important in this case that we should look to the rule, and see whether it has any application here, because, as you will learn further on, it is necessary to show what the connection of this defendant with that killing was. You can know his mental condition as related to the killing by his conduct alone, his words, actions, the relation that he bore to the man who with his own hand fired the fatal shot—all of these things are to be looked to, not only to show whether this act of killing was done willfully and with malice aforethought, but to show the relation of the accused to that killing. Now, let us proceed further.

Willfully means an act which results in death that is intentionally done, and one that is not accidentally done. Now, there is a great difference in the law between that which is accidental and that which is intentional.

The law fastens intent to every act that is not an accident. Now,

302 if we can find what under the law an accident is, and it is true, as I have told you, that the law fastens intent to every act that does not come under the classification of accident, we have intent in the law,

and we have willfully in the law, because willful/ means intentional and intentional means willful/. Every act that produces death that is outside of the definition of the word "accident" is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken, provided it is a wrongful or criminal act, which from its nature and the way it is executed as a natural and probable and reasonable result death may ensue from the execution of the unlawful or criminal act.

Now, by defining "accident" you can eleminate that condition from the case, if the evidence warrants you in so doing, and when you eleminate that from the case you necessarily have a case where intent and willful exists. An accident, under the law, is something which occurs after the exercise of the care which the law requires to be exercised to prevent its occurrence. We all have certain duties resting upon us. Instead of pointing a deadly Winchester at a man and firing it at him, our duty in handling a deadly weapon of that kind is to exercise the highest possible care, that injury may not be done by our handling it to our fellow-men. That is our duty. When we forget that, and when we point it at another, and fire it upon him, there can be but one reasonable conclusion from that act, and that is that that conduct is not indicative of an accident, but is indicative of a state of case where the mind of the party is such that he
303 willfully does it and intentionally does it. When a man exercises the amount of legal care exacted by the law, and something occurs beyond that, that is not his willful act. The law recognizes that he does not do it willfully. But when he does an act which naturally, or reasonably, or probably, from its nature and the way it is done, produces a certain result, that is held to be an intentional result, because the act, as done in that way, is intentional; and whenever an act is so done, and it is an act that may naturally or probably produce a certain result, whenever the act is done intentionally the result is intentional.

For example, if a man presents a gun at another and fires it at him, the fact of drawing the gun and presenting it shows that he wills what he does, shows that that act is a willful act upon his part. And when that state of facts exists the act of presenting and firing the gun is recognized by common experience and common observation as a willful act. If that act produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the result. Now, intent is something that can be found only by inference. It can be found only by the circumstances in the case by the nature of the act done, and the way it was done, and the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that
304 reason when a man presents a gun or a pistol at another, and shoots it at him, the law says he intends to kill him, because the killing is a result that is natural, or probable, or reasonable. So, in a case of that

kind, when you are called upon to find whether he intends to kill or not, you find, first, whether he presented the deadly weapon in shooting distance of him and fired it at him, whether that was a willful act, and when you find that (as I have told you), from the character of the weapon used and the manner of its use, because the weapon can not use itself; it can not present itself; it can not pull its own trigger; it can not, of its own accord, or of its own will power, because it has none, send the deadly missile in the body of the man who is killed—there is an intelligent will power that does all that—I say, when you find a gun or a pistol that has been held in that attitude, and that it has produced a deadly result, as reasonable men, as men of common knowledge, of common observation, you must come to the conclusion that the party willfully did that act, and when he willfully does an act of that kind he willfully produces the result.

Now, how may we find that the act was willfully done? The presumption that the law recognizes is, that a man is held to have intended the natural and ordinary consequences of his act. Every sane man who is a voluntary agent, acting upon a motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If one voluntarily or willfully does an act which has a direct tendence to destroy another's life, the natural and necessary conclusion from the act is that he intended to so destroy such person's life. So, if
the direct tendency of the willful act is to do another some bodily
305 harm, and death, in fact, follows as a probable consequence of the
act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life or to do him some great bodily harm, is a necessary conclusion from the act. You take the act done. Your common observation teaches you that a gun or pistol fired at another within shooting distance of him may put his life in danger; it may probably destroy it. You, therefore, take that condition shown by the proof, and you have a condition from the drawing and presenting and firing of the Winchester in such a way to kill Colvard as to show that he who fired it did the act willfully, did it intentionally, and he consequently produced the result intentionally. The law holds that he intended that result, because he is held by the law to have intended the consequences that are natural and reasonable, and that probably follow from the act as done by him. Now, I say, before going to the definition of the other expression, that if you have a state of case which shows that this killing was done willfully, and there is an entire absence from the case of that which gives the party or parties the right to kill, because it can not come under the law of self-defense, and because there is absent from the case that which would reduce the grade of the crime because of the provocation offered by the man who was killed at the time of the killing—if you have in the case an entire absence of either one of these conditions, and at the same time
you have the proof showing that the killing was done will-
306 fully, you have the existence of a case that shows murder, because
a willful killing, done without just cause or in the absence of legal provocation or that which mitigates or reduces the grade of the crime, shows a condition of malice aforethought, because one of the definitions,

and the one perhaps that is as comprehensive as all the others, or as the expression can be defined, is that a killing is accompanied by malice aforethought when it is the produce of a wrongful act, or an unlawful act, done without just cause or excuse, or in the absence of legal provocation or mitigating facts, and it is then murder. In other words, from the condition of willfulness you have as having sprung into existence a wrongful act done without just cause or excuse or in the absence of legal provocation, and you have the definition, consequently, of malice aforethought, as you will observe. It is therefore necessary that I should dwell at some length upon this expression willfully, not that you did not understand its meaning long before I got to the conclusion of the definition of it or the illustration of that definition, but that may show without any further investigation the existence of the other characterising element of the crime of murder, the trait which distinguishes it from any other homicide. Let us see what is meant by it. And I will read from another charge made by this court, which is printed :

" We come next to the phrase 'malice aforethought.' Let us see what it means and how we may find its existence. It is something that originates from the mind of the party doing the act. We must find some way of knowing, of getting at the condition of the mind of the party that is doing the act. If we can not fathom it, if we can not penetrate its in-
307 most recesses to see what is going on there, we must adopt some other means that are reasonable, some other process that is rational to get at the mental condition of the party, because both of these characteristics of murder spring from the condition of the mind of the party.

It can be fathomed alone by circumstantial testimony. The law says we may do it by circumstances. As a matter of fact we can do it in no other way. We may do it by reason of the character of the act alone. We are to characterize the act by the way it is executed, and the way it is done, not that we can get into the mind to see what is stamped on the tablet of that mind. We can not do that; and if we could, that would still be a circumstance showing the condition of the mind. But we can do it by something that is even more certain than that. We have facts that appeal to the reasoning faculties of the human mind, and to show that it was prompted by a spirit of malice aforethought in the shape of acts that are more certain, that are more reliable than all the words that could be uttered. A man may utter an idea, but in the future he may change his purpose; but when you find an executed act, you find a man's body riddled with bullets, you find that was done by the presentation at that body of a deadly weapon, and the firing of that weapon into it, you have an executed act which is indubitable in its proving power to show one way or the other whether that was a criminal act or whether it was an innocent act. The very way of executing it, the very circumstances surrounding every killing, will show whether it was a killing defensively done, or whether it was done criminally, and all that reasonable men need in order to enable them to come to an intelligent conclusion is to know the
308 circumstances surrounding the *the* transaction, and they can read its character, and they can characterize the act correctly, satisfying and obeying the rules of logic and law by the light of those circumstances that surround the doing of the act. The law says we may do it by circumstances—it says we must do it by circumstances where we can do it

alone by that character of evidence. We may do it, for example, by reason of the character of the act done, the manner in which it was done, and we may solve the condition of the mind by the light of the facts and circumstances that surround the act, going to characterize it, to show what manner of act it is, bringing to bear upon a condition of facts of that kind the observation of men of mature judgment, of men of intelligence, of men who, because of the amount of information they possess, are to the greatest extent qualified to discharge the great and responsible duties devolving upon them as jurors. As I have remarked to you before, when malice aforethought exists, murder exists.

Now, let us see what is meant by that. Let us get at an understanding of it if we can. Let us comprehend it fully that we may make no mistake and that we may make the proper application of it to the facts in this case. If the facts show that Andrew J. Colvard's life was taken willfully, and this other element which characterizes murder surrounded the transaction, known as malice aforethought, then the killing of Andrew J. Colvard would necessarily be murder and nothing else. Then, what is this element of this crime? The law in a general way defines it to be the doing of a wrongful act without just cause or excuse in such a way and under such circumstances as to show that it was done wrongfully
309 and that it was done in the absence of that which would give the party the right to defend against it, or that it was done in the absence of mitigating circumstances. Now, you take this case; go to the time of the killing; you take this gun and the way it was shot, pointed directly and fired, showing manifestly it was done willfully. You know it could not act itself that way, as I have already told you, and the power that used it in that way was the will power of the man who used it, and consequently it was used willfully. Then you find again what was the position of Colvard at that time, what was his conduct, whether he was armed or unarmed, what had he done that would give any man the right to take his life. I say to you in this connection that there is not one syllable of evidence going to show that it was a killing that under the law was justifiable, nor is it claimed to be such. Nor is there a syllable of evidence going to show that it was a killing which could be mitigated from this high crime of murder to a crime of less grade. If you believe the evidence shows this condition I have already named to you—that is, shows that the gun was intentionally pointed at him, and fired at him, that he was at that time unarmed, that he had done nothing which in legal contemplation would give the party or parties who did the killing the right to have taken his life—I say if such was the state of facts, and there was nothing of the kind that would give the right to kill him, if he was unarmed, then there was nothing to mitigate or justify the killing, because it would be a killing done wilfully, done wrongfully, in the absence of legal provocation, and in the entire absence of mitigating facts, and it would then be the doing of an act wrongfully and without just cause or excuse, and in such a way as to show that those who did
310 it had a heart void of social duty, and a mind fatally bent upon mischief.

Malice aforethought can only be found by circumstances, because it, like willfully, is something which exists in the mind, that is necessary to be found to make up the elements of the case, and as you can not get

into the mind to know what is going on there (and you could not tell what was transpiring there if you could get into it), you must learn it in some other way; and there must be some rational way by which you may learn it, some way that rational men would adopt, because you are not authorized to adopt any other method than that which is reasonable, in arriving at conclusions, and there is a reasonable way, which is the way that the law recognizes as a proper way by which men may arrive at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration, to see what was the nature of the thing done, whether it was an innocent act or a criminal act.

"Malice aforethought is the grand criterion which distinguishes murder from other homicides, and it is not so properly spite or malevolence to the deceased in particular, as any evil design in general." * * * If a man has special spite at another, and he has animosity, and he kills him because of that, that is malice aforethought. It comprehends more than that. If he kills him because of a general evil design, because of recklessness of purpose, because of general malevolence, which means hatred so far of everybody that he does not care whether they live or die, if a man
311 whose mind is in that condition wantonly and wickedly kills in consequence of that condition of mind, his killing is attended with malice aforethought, because that is the state of case that is comprehended by that expression, as well as where they kill because of spite, or hatred, or ill will, or to satisfy some animosity that may exist. This element of the crime of murder is 'the dictate of a wicked, depraved, and malignant heart; a purpose to do a willful and wicked act; and it may be either express or implied in law.' Now, the terms express malice and implied malice are expressions used more to characterise or classify it from the kind of proof offered to show its existence than anything else. There is no practical distinction between the different kinds of malice. Express malice is, when one with a sedate, deliberate mind, and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menances, or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man willfully poisons another. In such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice, for no person except of abandoned heart would be guilty of such an act upon a slight or upon no apparent cause.

"Malice is an intention to do bodily harm, a formed design to do mischief. It has also been defined as a deliberate intent to kill."

A man or a number of men go out armed, with the deliberate pur-
312 pose to kill another when they may overtake that other. That has malice aforethought in it. It does not make any difference what the other under such circumstances may do, but if you take it as in this case, if you believe the evidence, when he was doing nothing that was illegal or improper that could be used to mitigate an act of killing, or justify it; if there was a deliberate purpose to kill, it does not make

any difference how long or short the time it may have existed, if that deliberate purpose as shadowed forth by the manner of the killing, the character of the weapon used and the manner of its use, existed, and existed as affecting Stand Rowe, who did the actual firing, and as affecting this defendant under the principle of the law, I will give you presently, both parties in their acts would be surrounded by a condition permeated by this characteristic of murder known as malice aforethought. It could be no other class of killing; there could be no other reasonable conclusion of it under the law.

"It does not necessarily import especial malevolence toward the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit; a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation."

Now, understand me. Premeditation does not mean a thing that is thought of for a year, or a month, or a week, or an hour. In this age, with the wonderful perfection that has been attained in the manufacture of firearms, where a deadly purpose can be executed instantly, a premeditated purpose may spring into existence cotemperaneous with the execution of the purpose. A man who is armed with a pistol may meet another, and on sight of him may fire on him; he draws the pistol, presents
313 it, and fires it; he may have had no purpose to take his life before, yet there is premeditation, there is prior consideration, there is thought of beforehand, though as far as any perceptible power is concerned the conception of the purpose and the execution of it are cotemperaneous, because the very selection and use of a deadly weapon means premeditation, means though' of beforehand, and it is one of the facts by which we are enabled to characterise the act as possessing malice aforethought.

"Therefore, there must logically be a period of prior consideratio', but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvellous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

"Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. You can not tell by direct proof the condition of a man's mind, bearing in mind the distinction between those two kinds of evidence, positive or direct proof and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for."

314 In this case you have positive proof, as I have already told you, because men come before you who are apparently truthful, who tell you they saw the shooting. That is positive evidence of it. But, when you go to go back of that act in order to characterise it you are necessarily in the field of circumstantes, and you can characterise it by no other means than by circumstances.

"There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible and direct witness to that, and if he meant so to testify he would plead guilty. The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind and the feelings of his heart, by a careful study of the acts which the individual performs, and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text-writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as expressly positive evidence.

"It can not be demonstrated as express, by such evidence.

"We have no power to ascertain the certain conditions of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is from our common experience presumed to have anticipated that result, and to have intended it. Therefore, we have a right to say, and
315 the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed for any definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we frequently find the statement laid down in reported cases and by text-writers that malice is to be inferred from the use of a deadly weapon."

I modify that and say it is to be inferred from the use of a deadly weapon when there is an entire absence from the case of that which would justify the use of that weapon, or which would mitigate the use of it, or reduce the grade of the crime growing out of its use. If there are neither one of these propositions in it when you have a case where a life has been taken by the use of a deadly weapon showing that it was willfully used, you have the doing of a wrongful act without just cause or excuse, and in the absence of legal provocation or mitigating facts, which produce death, and consequently from the existence of willfulness you have the existence of malice aforethought.

Now, the law again says:

"Malice is to be inferred from the attendant circumstances surrounding the transaction, and the jury have a right, and it is their duty to look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engaged in that act, as being the only way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or
316 the converse of that, in which there was an absence of that element of the crime of murder.

"Now, anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or willful act that might result in death, is evidence that may be considered by the jury as evidence of malice and of the existence of malice aforethought. For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill directly

existed in the mind of the party or parties who killed, or the purpose to do a willful act that might result in death is shown by the actions of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought, provided there is an absence from the case of that state of facts which goes to show the party had a right to do what he did do. The law lays it down that the deliberate selection and use of a deadly weapon show premeditation, shows that the act was thought of beforehand; and whenever a party enters upon whatever unlawful or criminal enterprise he may enter upon prepares himself with a deadly weapon with the purpose of using it in a wicked or unlawful enterprise, if it be one of that character, enabling him to consummate and carry out that enterprise, the selection of a weapon for that purpose is evidence of the existence of malice aforethought, is evidence of the existence of a purpose to do a wrongful act without just cause or excuse, in such a way as to show that the party who does it has a heart void of social duty and a mind fatally bent on mischief."

I have now undertaken to define this other trait to you and to
317 tell you how you may find its existence as well as the existence of willfullness, the two ingredients which enter into the crime of murder and which go to make it up. If under the rules of law I have given you defining these characteristics of the crime of murder, and if under these rules telling you how you may find their existence, you are satisfied beyond a reasonable doubt that Andrew J. Colvard was killed in such a way as that his killing was murder, you have found that the crime of murder was committed by some one. Then you must proceed further in the case to ascertain who it was that committed that crime.

Two parties are charged in the indictment with having committed it. Only one of them is on trial, because, as the evidence shows you, the other one was killed in an attempt to arrest him, or by some means or another. I do not remember now that the evidence shows particularly how he was killed; but he is dead, and it is impossible to try him; yet his connection with this killing, his actions and his conduct are to be passed in review by you, to see whether this defendant is so connected with these actions and that conduct as to make him under the law a criminal, and make him responsible for that crime. I say to you again, that if you find Stand Rowe willfully or intentionally presented and fired his gun, and the deadly missile entered the body of Colvard and took his life, and you find nothing but that state of facts I have named, and you find in connection with that that there was behind that act a specific purpose because of the existence of specific reasons, you have that which shows more clearly the existence of premeditation, of deliberation, of a design to kill thought of beforehand, and if you find either one of these conditions—if you find simply the firing of the gun in a willful way without anything to
318 justify it (and I tell you there is nothing shown by the evidence to justify it), or without anything to mitigate it (and I tell you under the law there is no proof here showing any mitigation), you must necessarily find that this killing was murder.

Now, I have told you that you may find it from the act of drawing and presenting and firing the gun alone, but if you do find that there may have been a motive for this act, that only throws additional light upon this case; not that you are required to find motive. Motive is not neces-

sary to be found. If that were true, there would be hundreds and thousands of the worst murders that could be conceived where the perpetrators could never be brought to justice, because it is not possible in many of these secret crimes, and they are the worst, to find out what the motive was. The motive is so concealed it can not be ascertained. Therefore, would it be justice to say that the assassian could enter the household and because you could not find whether his motive was rape or robbery, when he had assassainated the members or a member of that household, that he should go scott free, although the evidence showed beyond a reasonable doubt that he did it? Would that be a rational administration of the law? Would that be holding before the minds of these criminals this mighty and majestic power which keeps you in the possession of your life, and me in the possession of mine, and every other peaceable citizen in the possession of his? No; because when we take away that majestic power there is no one who has a guarantee for one moment for the safety of his life against the death-dealing assassian. It is this power, that next to God we should worship, that is to be invoked for the
319 protection of innocent human life, whether you can discover motive or not, which causes the assassian's finger to pull the trigger. If you can find it so much the better. Now, let us see in this connection what the law says about this matter of motive.

"It is sometimes argued, is it likely that one man should kill another for so small an article?" Or, I will add, for so simple a reason, because of the fear of detection and punishment for some crime, or because of some ill-will or grudge or malavolent feeling that a party may have towards another, is it reasonable that a party would execute a spirit of vengeance against a human life so as to destroy it for any of these reasons? Not in your judgment, not in the judgment of any innocent and honest man is it reasonable, but when a human life is wantonly and wickedly and maliciously taken it is always taken without reason in the judgment of an innocent and honest man, and if the act is weighed by the light of the consequences that follow there is no adequate reason, no adequate or proportionate motive that can be conceived that would in his judgment excuse the doing of that act. It is not the adequacy of the motive, it is not its proportionate character as viewed by an honest and proper thinking man that is to be considered or that may be looked upon as the motive which prompted the act, but it is a motive that may prompt a disordered and frequently a debased and devilish mind that is to be looked to by the jury, because it is the only kind of motive that is always behind deliberate, willful, and premeditated murder. Then why should we look for its proportionate character? Are we competent from our standpoint as lovers of human life, as those who desire to see all the power and force of
320 the law exercised for the protection of innocent human life—I say, are we competent to set down and measure the proportionate character of a motive that would be behind a deliberate and willful killing? We are incompetent for such a task. It is only a man whose mind is so debased that he resolves to stain his hands with innocent blood that can find motives that he deems proportionate."

The law says: "It is sometimes argued, is it likely that on' man should kill another for so small an article? Are we not to infer when there is a homicide which is followed by the stealing of a mere trifle that the homi-

cide was the result of sudden passion rather than lucri causa? Or for a mere prejudice or spite is it likely that one man will assassinate another, and thus expose himself to the gallows? No doubt when a tender mother kills a child, or a friend kills a friend, and nothing more than the fact of killing is proved, we may be led to infer misadventure or insanity, from the motiveles'ness of the act."

"But we have no right to make such an inference because the motive is disproportionate, in our judgment—because as honest men we can not find a proportionate motive. We are all of us apt to act on very inadequate motives; and the history of crime shows that crimes are generally committed from motives comparatively trivial. A man unaccustomed to control his passions, and unregulated by religious or moral sense, exaggerates an affront or nourishes a suspicion until he determines that only the blood of the supposed offender can relieve the pang.

"So also for the smallest plunder murders have been deliber-
321 ately executed. We have an illustration of this in the trial of Muller, in England, in 1873, for the murder of Briggs. Briggs's watch was seen by Muller in a railway car. Briggs was asleep; the watch was exposed; and Muller killed Briggs by a sudden attack, and succeeded in making his escape. He was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the homicide with the murder. Until the confession the justice of the conviction was largely criticised on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great. But the reply to this is obvious. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational."

A man who would consult his own interest would never commit a crime. If a man goes out and steals a horse, and is brought to jail for the commission of the theft, is found guilty, restrained of his liberty, looses his valuable time for the time he is imprisoned, has attached to him the disgrace necessarily following such punishment for such an act—if he would but stop and consider that perhaps in one-fifth of the time his liberty is taken away from him he could go out and by honest toil earn five or more horses, and still have the respect and confidence of his fellow-men, he would never do it. It is not a rational act from the standpoint of hon-
esty, from the standpoint of integrity, from the standpoint of duty
322 to ourselves and others. All crime is to a certain extent irrational, but that is not any reason why men's lives are to be destroyed willfully and wantonly; that is not any reason why their lives are to be taken away from them by the criminally disposed, because they act irrationally. Society is entitled to protection, and it will have it either under the law as properly and impartially administered, or when men become criminals by taking the law in their own hands and seek to secure protection when protection fails them at the hands of courts and juries. "The motive is never correlative to the crime; never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and

kill, so that an inheritance might be theirs. When a powerful passion seeks gratification it is no extenuation that the act is illogical, for when passion is once allowed to operate reason loosens its restraints."

I take it that that is enough upon the question of the existence of motive, or the adequacy of it.

There are but two other propositions in this case. The one that I am now about to approach is a proposition that has been invoked in many great criminal trials in this country. It is a proposition you are required to look at closely and carefully. You are required to see just what the law requires to connect this defendant with the act of killing Colvard, and then to see what the evidence shows in that regard in order to enable you to find out whether or not he is guilty of this crime of murder as charged against him. It is a principle that was invoked in the celebrated trial of the case of the United States against Aaron
323 Burr in 1807, and it was the principle invoked in the great trial where Webster made his immortal speech, using the declaration, "Murder will out;" it is the principle that largely contributed to the conviction of the men who were tried in the case of Spies against the State of Illinois, as it stands reported in the court of appeals, involving several Anarchists in Chicago wherein they were charged with the murder of several policemen; it is a principle when it exists, when it is shown to exist, as connecting a man with the crime of murder, that makes him as guilty as though he had with his own hand fired the fatal shot which took the life of the man alleged to have been murdered—in this case Andrew J. Colvard. After giving you the law upon that we will then call your attention to your duty in looking at the testimony, to see what the connection of this defendant with this act was, and then to remind you that under the law it is not required to demonstrate this case, but simply to prove it to that extent that any proposition of importance as affecting another is required to be proved by dispassionate and impartial men in the ordinary affairs of live before they arrive at conclusions, and it is to that extent that is known as beyond a reasonable doubt.

We are to proceed, then, to see whether the defendant was a party to the killing—that is, whether he was connected with it, or so aided or assisted in producing the act as that under the law he is responsible by the rules of the law for that act, as well as the man who fired the fatal shot, if he were alive. We go to the first proposition where the crime of murder has been committed, which asserts that he who with his own hand did the act which produced the result is guilty. The second proposition is
324 that if, at the time that Andrew J. Colvard was shot by Stand Rowe, the defendant was present at that time and at the place of the shooting. That, of course, would not alone make him guilty—the mere fact that he was present. Yet it is an element that we are to take into consideration to see whether his connection with the act of killing was such that he is guilty of the crime, because he could not be guilty unless present, actually or constructively. Then we are to see whether he was present at the place of the killing. That does not mean that he had to be right at the man who was shot, or right by the side of Stand Rowe, but that he was so near to that place as that he could in some way contribute to the result that was produced by some act done by him, or some words spoken by him. First, then, we inquire if he was present at the place of

the shooting, and then while so present whether he aided, abetted, or advised or encouraged the shooting of Andrew J. Colvard by Stand Rowe. Now, that is the second proposition I have asserted. Stand Rowe, as the proof shows beyond controversy (and when the proof shows anything beyond controversy I may allude to it in that way) is the man who fired the gun. If the defendant was actually or constructively present at that time, and in any way either aided or abetted by word or by advising or encouraging the shooting of Colvard by Stand Rowe, we have a condition which under the law puts him present at the place of the crime, and if the facts show that he either aided, abetted, assisted, advised, or encouraged Stan' Rowe he is made a participant in the crime as thoroughly and completely as though he had with his own hand fired the shot which took the life of the man killed. That is the second condition. The law say further, that if he was actually present at that place at the time of the firing by Stand Rowe, and he was there for the
325 purpose of either aiding, abetting, advising, or encouraging the shooting of Andrew J. Colvard by Stand Rowe, and that, as a matter of fact, he did not do it, but was there present at the place for the purpose of aiding or abetting, or advising or encouraging his shooting, but he did not do it because it was not necessary, it was done without his assistance, and the law says there is a third condition where guilt is fastened to his acts in that regard. I have not given you the condition where there is established what is called actual presence at the place, accompanied either by a physical act of violence done with his own hand which produced the result, or by the aiding, or the abetting or the advising or encouraging the doing of a physical act of violence by another, and that he was at that place, and was there for the purpose of advising or abetting or assisting or encouraging or counselling the doing of the act of violence. If either one of these conditions exist as affecting the defendant the act is his as much as it is the act of the man who, with his own hand, slew Andrew J. Colvard. Now, I give you other conditions that grow out of and are contemplated by the law as constructive or legal presence at the place. That does not mean that the man is at the place actually at all, but it means that he is so near to the place as to be able in some way to assist or advise or counsel or abet or encourage the act done, and when he is so situated with reference to the act done and is doing this, or there for the purpose of doing it, that is a crime, and when he is so situated and actually does, in some way, by act or by word, aid or abet or advise or assist or encourage the man who fired the fatal shot, the law contemplates that he is present at the place of the crime and is an actual participant in it, because he
326 aided or advised or abetted or counselled or encouraged by word or act the doing of the deed done by the party who did it with his own hand. The law contemplates another condition out of which guilt may grow, and it is a condition where there may be only constructive presence, and as a matter of fact no act done in the way of encouragement or advise or counsel or by way of abetting the crime. This is when he is so constructively present for the purpose of counseling or abetting or encouraging the act done, if he should be called upon to render assistance in one way or another to that other—if he is so situated with relation to the crime, if he is in such a position as described in the last proposition in contemplation of law, he is present at the place of the crime, and he is so far par-

ticipating in it by putting himself in a condition by being so situated as that the law lays hold of his conduct and brands it as a crime, just as well as it brands the conduct of the man who with his own hand fires the fatal shot as a crime. Now, I have given to you all of these propositions, and if the defendant occupied either one of them, and that state of case is shown by the facts and circumstances in the shape of his conduct, in the shape of his declarations, in the shape of his actions with reference to the killing, or with relation to the man who was killed, or the man who actually did the killing, this Indian, Stand Rowe, there would be guilt as affecting him. It may be pertinent to inquire, it may be necessary to ascertain, in order to fully satisfy you how a man can aid or assist or abet or encourage or counsel the killing of another in such a way as to make it a crime, what he has to do to do that. If he renders encouragement to the man who does the act, if he gives him actual assistance, actual physical assistance,
327 or does some physical act that contributes to the result, he aids him. He may encourage him by word or by deed. He may be a participant in the killing by the use of words alone, when he is present at the place of the crime, by the influence of these words; or he may do it by the doing of acts, if the influence of these acts upon the man who draws the gun and pulls the trigger is to hasten him, if his action is expedited, or is more quickly brought into existence, because of assistance of that character, if the aid is such as to embolden the perpetrator, to afford him hope or confidence in his enterprise, it is aid, it is assistance, it is encouragement. As was remarked by the supreme court of Illinois in the case of Spies against the People, to which I have before referred, "Those who advise, encourage, aid or abet the killing of another are as guilty as though they took his life with their own hands." Those who aid, abet, or advise or encourage the killing of another, if that killing is a crime, make it their crime as well as it is the crime of the man who fires the shot with his own hand. They may render this assistance or his aid by doing acts, or they may do it by words alone, if the influence of these words upon the mind of the other have a tendency to encourage him in the doing of the act. We have the same principle expressed in the case of United States against Aaron Burr, tried for treason before Chief Justice Marshal, where this language was used:

"When the law requireth the presence of the accomplice at the preparation of the fact, in order to render him a principal, it doth not require a strict actual immediate presence, such a presence as would make him
328 an eye or an ear witness of what passeth. The terms used by Foster are such as would be employed by a man intending to show the necessity that the absent person should be near at hand, although, from the nature of the thing, no precise distance could be marked out. An inspection of the cases from which Foster drew his general principle will serve to illustrate it. (See Hale, 439.) In all these cases, put by Hale, the whole party set out together to commit the very fact charged in the indictment, or to commit some other unlawful act, in which they are all to be personally concerned, at the same time and place, and are, at the very time when the criminal fact is committed, near enough to give actual personal aid and assistance to the man who perpetrated it."

That treats more especially in that part of it of the presence of the party. A party, then, in order to connect him with the act, has to be

present at the place of the crime, actually or constructively, and in addition thereto he has to do some act or he has to utter words which have a tendency and do aid or assist or advise or contribute to the execution of the result, or encourage the party in the perpetration of the result. The presence alone of the party is not sufficient to constitute him principal in the second degree—that is, to make him equally responsible with the actual perpetrator, unless he was aiding and abetting the perpetrator. This implies assent to the crime. Mere bodily presence without any attempt to prevent the crime, though it can not of itself consist of guilty participation, is evidence from which the jury may infer his assent to the occurrence, and if constructively present, with the expectation of
329 giving him aid, it is not necessary to prove that the party charged as a principal in the second degree was actually present at the place and assent during the whole transaction, it being sufficient if he was actually or constructively at the same place. If one counsel another to commit suicide and is present at the consummation of the act, he is a principal in the murder. Although a man be present whilst a felony is committed, but he takes no part in it and does not act in concert with those that do it, he will not be a principal in the second degree, simply because he did not apprehend the felony. Something must be shown in the conduct of a bystander which unmistakably evinced a design to encourage, incite, approve, or to in some manner offer aid or consent to the act. It is not necessary to prove that the party actually aided in the commission of the offense. If he watch in order to prevent surprise or remain at a convenient distance in order to favor escape if necessary, and was in such a position as to be able to come to their assistance and aid if it become necessary, in contemplation of the law he was aiding and abetting.

In this case if you find that the conduct of the defendant, in the shape of his words, in the shape of his association with Stand Rowe at the time of the killing, or before that time, or after that time, from all of these things taken together, and you find that he was present at the place of the killing, and by acts or by words aided or assisted or advised or counseled or encouraged Stand Rowe in the doing of this act, it is his act as well as the act of Stand Rowe, and it is the act of both of them. Then it becomes necessary in this connection to settle the question (and it is a pertinent and relevant one) as to whether the defendant did such act or acts
330 or made such declaration or declarations as actually had the *affect* to encourage Stand Rowe to do the deed—that is to say, that he the more readily, the more quickly, the more rapidly, did it because of that encouragement in the shape of acts or words from or by the defendant than he would otherwise have done it. You are required, I say, to find that condition, for it is the law that the presence, actual or constructive, and the acts or words of defendant at the time of the killing must be such as to ally him to the act, and while there is such presence he must in some way, either by word or act, encourage or aid in the consummation of the act—in this case the killing of Andrew J. Colvard by Stand Rowe. This law undertakes to hold all men responsible whoever intend to kill, and who so far manifest that intent by word or act as that we can take hold of this manifestation in the shape of the words or acts and get at their intent by the light of such words or acts; and if these words or acts contribute to a death which is murderous, I tell you by the rules of the law all

persons so allied to a homicide or a murder are responsible for it, and it is right they should be; because, perhaps of that encouragement a man's life is destroyed, because of that aid a deadly result was brought about, because of that assistance rendered a person was caused to surrender his innocent life.

Now, perhaps, in this connection, as these two parties are charged with acting together, it may be necessary to briefly give you the underlying principle called a conspiracy which germinates joint and criminal action. There is no mystery about what a conspiracy is. It is an agreement to do an unlawful act. Now, it does not have to be formed beforehand. It may be entered into cotemporaneous with the doing of the act. I may
331 see a man out here, and I see from his conduct that he intends to kill my neighbor; I want him killed; I join him at the place of the killing, and by word or act I assist in the killing; there is a conspiracy; there is an unlawful agreement entered into between two of us to do that wicked act, though there may have been no word uttered between us to enter into that formal agreement, because the law says we may enter into it either before the killing or at the time of the killing; we may enter into it by express words, or we may enter into it tacitly—that is to say, with knowledge of what is to be done, and then another joins in and assists the party who with his own hand carries out the purpose of the conspiracy. When we do that we become participants, we become a members of that unlawful undertaking; we join in it, and as long as we continue in it and a member of it we are responsible for whatever transpires at the hand of any member of that conspiracy. The act of one is the act of all, and as long as this conspiracy exist' and as long as a party remains a member of it, after he has joined it, whatever is done by one is done by all; they speak out of one mouth; they strike the deadly blow with one arm. Now, this condition of a conspiracy is one which exists in the minds of men, and you can only get at it by the light of circumstantial evidence; you can get at it only by the association of parties together. From your experience and observation in life you are possessed of a wisdom which enables you to judge of the sentiments of men by the company they keep, by the associations they have, by those they congregate with, and this may be taken into account here in connection with the acts, declarations, and words of the defendant. Then, again, your observation in life teaches you to know the conduct of innocent men. Now, I have given you what germinates the joint action, this underlying condition called con-
332 spiracy. Men join it either by express words, or they join it tacitly, as the law calls it, by having knowledge of what is to be done and by assist' in it by word, act, or deed, or by something that aids or abets or assists or advices or encourages he who with his own hand may carry out the wicked purpose.

Now, then, I say it is for you to take the circumstances surrounding this killing in order to enable you to measure the conduct of the defendant, because by the light of that conduct you must see his relation to this case, and you must see that relation before you can intelligently pass on his guilt or innocence. It is true that these facts are circumstances, but I hope there is not that degree of prejudice against that class of evidence that would cause you to halt or hesitate in arriving at a conclusion from this kind of evidence, if these circumstances are sufficiently powerful as prov-

ing facts to satisfy you, as reasonable men, that the proposition is true. If you are to be governed by principles of that kind, of course you overturn one of the great agencies to be employed in the ascertainment of the truth, called circumstantial evidence. And it may be proper to dwell for a moment and give you the view that the law takes of this class of evidence, how it is regarded by those who have administered the law, what figure it is to cut in considering the conduct of men, who come before you as citizens to enable you to see either their innocence or their guilt. Mr. Bentham tells us that all evidence flows either from persons or things. These are the only two sources from which we can expect testimony, and unless we resolve to let all secret crimes go on unpunished or civil suits to remain unsettled, and to throw away our reasons, we must conclude
333 upon the statements of persons or things. Now, things make statements; they are inanimate; they have no tongue; they do not use words as men can use them; yet, as the great poet says, they speak with tongue that is most marvellous in its power. Because they are inanimate they can be neither bullied or bribed; they have no motive to swerve from the truth. If they are properly investigated, if they are properly discovered, if they are properly analyzed by those who pass upon them, they lead to a conclusion that is inevitable, and with as much certainty as positive proof, and this is the universal view of the law. I say, "statements of things" because if we consult the experiences of every hour we will be taught that inanimate objects have their tongues as well as sentient things.

"It is vain, then, for man to say that because others have failed in their efforts to detect error he will sit quietly down and perversely refuse to apply his intelligence to the problems of life, whether they encounter him in the counting room or the jury box.

"He might just as well refuse to use his legs because others have failed or been killed in walking. He might with equal propriety refuse to eat because others have been poisoned while partaking of nourishment.

"Some persons, admitting the force of the principle which actually compels us to act upon evidence, still insist that nothing but positive testimony should produce conviction, and, adhering tenaciously to this favorite dogma of those who are too timid or too weak to exercise the reasoning faculties with which a kind Providence has endowed them, they assail all
334 circumstantial evidence.

"A moment's reflection, however, must satisfy all candid minds of the unsoundness of such a proposition. Suppose for a moment that this was the rule of our being, and that we had been so constituted that we could not believe a thing unless it were demonstrated to us by our own senses or by the statement of an eyewitness, what would then be our condition? Of course we could not punish any crime unless it were perpetrated in the presence of spectators. All secret murders, arsons, and burglaries, forgeries, and other offenses could be committed with impunity. Nor would the mischief stop here. Few civil controversies could be settled by juries; no book of original entries could be received in evidence; no note or obligation would avail unless there were a subscribing witness. Indeed, this would not be sufficient, for if he died before trial the claim would expire with him. An insurance on the life of the witness would not even avoid the difficulty, for the policy would die with its attesting wit-

ness. For the same reason, all receipts would perish with those who saw them signed, and all our deeds and muniments of title would be swept away by the death of the subscribing witnesses and the magistrates before whom they were acknowledged. All proof of handwriting by comparison be annihilated; commerce would be destroyed or remitted to its infancy in barbarous ages. With the abolition of legal punishment for crime, mob laws and vigilance committees would supersede the use of courts and juries, and the whole framework of society would be impaired, if not destroyed. The absurdity of the prejudice against circumstantial evidence, may be still further illustrated by reflecting for a moment upon the
335 use to which we constantly and properly apply it. Not only do business men answer letters, pay drafts, and credit others to the extent of millions daily upon the testimony of circumstances alone, but they commendably carry this faith, as the evidence of things unseen, into the reasoning which connects them with the world beyond our own. A trifling circumstance, the fall of an apple, has proved to the satisfaction of philosophers the great laws of gravitation, which control the motions of universe. The man who denies the existence of his Maker is properly regarded by many as thereby evidencing his want of reason.

"Yet what proof have we of this important and accepted truth except from circumstances? The same kind of testimony is the proof of our belief in all the great truthes of revelation. If we turn from the world without to the great mechanism within us, we see again that no rational man pauses for one instant to doubt the force of circumstantial testimony.

"What evidence have we that it is a heart that beats, or a brain that throbs within us, except from the fact that those organs exist in all similar constituted beings? And we accept remedies for all the ills that *flesh* is heir to, upon precisely the same faith in circumstantial evidence.

"Chief Justice Gibson has given an excellent illustration of the force of this kind of testimony. He says (Com. v. Harman, 4 Barr, 272): 'You see a man discharge a gun at another. You see the flash, you hear the report, you see the person fall a lifeless corpse, and you infer from all these circumstances that there was a ball discharged from the gun which entered his body and caused his death, because such is the usual and natural cause of such an effect. But you did not see the bal' leave
336 the gun, pass through the air, and enter the body; . . . . . and youtestimony to the fact of killing is thereby only inferential; in other words, circumstantial.'

"The improvements of modern science furnish us with another illustration. You are in a telegraph office, and see the battery in motion. A message is received. The station at the other end of the line may be a thousand miles distant. No human eye saw the subtle fluid pass along the wire, and yet you would hardly listen with patience to the man, or the argument, undertaking to reason to you that the message might have come through the air or the earth without the agency at the wire, and that all your evidence to the contrary was circumstantial, and therefore unworthy of regard.

"In short, a skepticism like this would open wide the door for the perpetration of all secret crimes, would uproot our faith in man, and destroy even our belief in a Creator and in a future state.

"These are some of the evils which would flow from the declaration of a principle that we should reject all circumstantial evidence."

We never could convict a man of a crime that had intent or willfulness or malice aforethought in it, because it is alone by circumstantial evidence you know the existence of this characteristic of the highest crime known to man, the act of taking human life, known as murder.

I say it is your duty to take into consideration these circumstances in the shape of the words and acts of the defendant to see whether
337 he was connected in any manner or in any one of these ways I have pointed out as the ways that the law recognizes he must be connected with this killing to make him responsible for it.

You have had this case presented to you; you have had elaborate arguments upon both sides, and I have given you the rules of law which the law points out as directory upon you to enable you to find out what the facts are. In passing upon the circumstances coming from witnesses, you are first required to find whether these circumstances exist, and after you have found that you are required to find what they prove. Do they show whether or not the defendant was connected with the act in any one of these ways I have described that makes him criminal, that makes him guilty of the crime of murder? To find out what the facts are you are to take the position of the witnesses at the time they say they made their observation; you are to take into consideration what they may have said to you as to what they heard as coming from the defendant, or as coming from Stand Rowe, or as showing their joint action or their joint participation in this act, or to find whether it is a fact that Stand Rowe fired the gun with his own hand, and that the defendant was either actually or constructively present, either aiding or assisting or advising or by word or act encouraging the commission of the act. You are to see the position of these witnesses—the opportunity, in other words, they had for observing the facts; the observations made by them, the character of these observations, what they show as to what was the relation of the defendant to his act. Then you are to look at their consistency, their reasonableness, their probability, and their naturalness in themselves and by themselves and when viewed
338 in the light of the other facts that you may find to be true. You are to consider the apparent candor, or the opposite, of these witnesses; their apparent truthfulness as characterizing their evidence, from the manner they gave it, from its reasonableness and its probability, and from their interest in the case. The defendant has gone on the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and, above all, you consider it in the light of the other evidence, in the light of the other facts. If he is contradicted by other reliable facts, that goes against him, goes against his evidence. You may explain it, perhaps, on the theory of an honest mistake, or a case of forgetfulness, but if there is a conflict as to material facts between his statements and the statements of the other witnesses who are telling the truth, then you would have a contradiction that would weigh against the statement of the defendant as coming from such witnesses. You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case, the

largest, perhaps, we could have under any circumstances in life, and such an interest consequently as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore it is but right, and it is but your duty, to view the statements of such a witness in the light of his attitude, and in the light of the other evidence.

339 I say to you in conclusion that the elements which go to make up this crime must be proven—not to an absolute demonstration, because they can not be proven that way; that is impossible. They must be proven to that degree of certainty that they satisfy you as reasonable men, as impassionate men, as deliberate men, that under the law defining this crime, and under the law telling you how a person may be connected with a crime though he may not with his own hand do the act of physical violence, if you are satisfied by the light of these principles of law and by the light of the truth as proven by the testimony in the case, growing out of his conduct, growing out of his acts, growing out of his declarations, growing out of his association with Stand Rowe before he died, and after he died, whether or not there is a state of case that you have an abiding conviction to a moral certainty is true; or, in other words, there is a state of case that you as reasonable men, as just men, as impartial men, by the light of this law and this evidence would believe to be true; and if this is so it is established. It is only what such men believe, only the high degree of certainty that they require that you are to have in order to believe the case as jurors, because that is the rule, what reasonable men would believe by the light of the evidence and by the light of the law defining the crime, that you as such men are required to believe in the jury box. And that is all there is in this proposition of proving a case beyond a reasonable doubt. It means the establishment of a case so there is banished from it all doubts for which good reasons can be given, not that all doubts are driven out of it, because they are never banished from the case, for there are

340 doubts in every case that may be denominated surmises and conjectures, but they are not of a character that reasonable men regard; they cause them to be dispelled from the presence of the consideration of a proposition around which they may hover. It is only the real substantial doubt of guilt that flows naturally and reasonably to your minds from the whole testimony in this case that you are to regard.

Now, I say to you, that if by the light of this law, by these principles I have given you, showing how a man may be connected with a crime, and be responsible for the results of it, if this proof shows beyond a reasonable doubt, this proof in the shape of conduct and actions and declarations of the defendant at the time of the killing, or before that time and after that time, show his connection in any one of these ways that makes him responsible, and that state of case is proven beyond a reasonable doubt, your duty is as imperative to convict him as it would be to convict Stand Rowe if he was on trial before you, because in such a case as that, by the rules of the law, by its imperative mandate, both would be responsible for the crime.

If that state of case does not exist in this case, and if he was not connected with it by word or act or declaration in such a way as to show that

he was allied in some one of these ways to the crime, and that state of case is not proven beyond a reasonable doubt, your duty, of course, would be to acquit him.

I submit this case to you with the confident belief that you will give it that deliberation and consideration that it merits by reason of its importance. It is only by this consideration, by this dispassionate method of administering justice that the law is upheld and that crime is to
341 some extent suppressed. (At this point, Mr. Frederick, counsel for defense, handed the court a paper.)

If the jury believe that the defendant was present at the time and place of the killing, and that he was there with no purpose of aiding or abetting the killing by Stand Rowe, who did the killing, then you are to find the defendant not guilty. If he went there with no purpose of that kind then he would not be guilty. If you can consider his actions and words or declarations upon any reasonable hypothesis other than guilt, or upon the theory of innocence, it is your duty to do so, but if these words of encouragement—if they were such—if they had that influence, if these acts of encouragement—if they were of that kind and had that influence—if they aided or assisted, or abetted or encouraged Stand Rowe in the shooting, so that he did it even the more quickly or even the more readily than he would otherwise have done it when acting alone, the defendant would contribute to the result, and be equally responsible with him for it. In passing upon the question as to whether his presence was an innocent presence or not you are to consider whether it can be explained upon the theory of innocence; you are to consider it in the light of the facts, in the light of the evidence, and in the light of the acts, and in the light of the declarations of the defendant. As to the use of words by this defendant, the defendant is held responsible for the effect of words deliberately and intentionally used by him, as he is to be held responsible under the law the for the use of acts deliberately and intentionally performed. A man is held by the law to have presumed and intended that which may follow as a necessary and natural consequence from the deliberate use of words. If the deliberate and intentional use of words has the
342 effect to encourage one man to kill another, he who uttered these words is presumed by the law to have intended that effect, and is responsible therefor. If they are words used under excitement, and consequently not deliberate, they are words that are not calculated as to produce naturally and reasonably and probably a certain result, they do not have that effect; but words deliberately and intentionally uttered, and which produce a certain result, are held by the law to have been intended, unle's they are in some way explained by the party using them, that they were hastily used, or that they were not intended.

It is necessary for you in this case to look at the act or the defendant beforehand, in going to this man and getting him to the place, by his words or by his statements to him, or in the vicinity of the place where he was killed. You are to see whether that has been reasonably explained away upon an innocent theory. If it has not, you are to take it into consideration as a circumstance going to indicate or that may be used by you going to show the purpose of getting the deceased in a position where his life could be taken.

All of these facts and circumstances are to be taken into consideration by you.

Then, as I was about to say, I submit this case to you, with the full belief that you will decide it with that equal and exact justice that it merits under the law.

11:50 a. m.

Verdict, "Guilty of murder."

343 The court, among other things, charged the jury as follows:

"We are to proceed, then, to see whether the defendant was a party to the killing; that is, whether he was connected with it, or aided or assisted in producing the act as under the law he is responsible by the rules of the law for that act, as well as the man who fired the fatal shot, if he were alive. We go to the first proposition where the crime of murder has been committed, which asserts that he who with his own hand did the act which produced the result is guilty. The second proposition is that if at the time *th* that Andrew J. Colvard was shot by Stand Row the defendant was present at that time and at the place of the shooting. That, of course, would not alone make him guilty, the mere fact that he was present.

"Yet it is an element that we are to take into consideration to see whether his connection with the act of killing was such that he is guilty of the crime, because he could not be guilty unless present actually or constructively.

"Then we are to see whether he was present at the place of the killing. That does not mean that he had to be right at the man who was shot, right by the side of Stand Rowe, but that he was so near to that place as that he could in some way contribute to the result that was produced by some act done by him or some words spoken by him. First, then, we inquire if he was present at the place of the shooting, and then while so present whether he aided, abetted, or advised, or encouraged the shooting of Andrew J. Colvard by Stand Rowe. Now, that is the second proposition I have asserted. Stand Rowe, as the proof shows beyond controversy (and when the proof shows anything beyond controversy I may allude to it in that way), is the man who fired the gun. If the defendant was actually or construct-

344 ively present at that time and in any way aided or abetted by word or by advising, or encouraging the shooting of Colvard by Stand Rowe, we have a condition which, under the law, puts him present at the place of the crime; and if the facts show that he either aided, abetted, assisted, advised, or encouraged Stand Rowe, he is made a participant in the crime as thoroughly and completely as though he had, with his own hand, fired the shot which took the life of the man killed. That is the second condition. The law says further that if he was actually present at that place at the time of the firing by Stand Rowe, and he was aiding, abetting, advising, or encouraging the shooting of Andrew J. Colvard by Stand Rowe, and that as a matter of fact he did not do it, but was present at the place for the purpose of aiding or abetting or advising or encouraging his shooting, but he did not do it because 'twas not necessary, it was done without his assistance, the law says there is a third condition where guilt is fastened to his acts in that regard."

To the giving of which charge to the jury the defendant at the time excepted.

The court among other things charged the jury as follows:

"Now, I have given to you all of these propositions, and if the defendant occupies either one of them and that state of case is shown by the facts and circumstances in the shape of his declarations, in the shape of his actions with reference to the killing or with relation to the man who was killed or the man who actually did the killing, this Indian, Stand Rowe, there would be guilt as affecting him. It may be pertinent to inquire, it may be necessary to ascertain, in order to fully satisfy you how a
345 man can aid or assist or counsel the killing of another in such a way as to make it a crime, what he has to do to do that. If he renders encouragement to the man who does the act, if he gives him actual assistance, actual physical assistance, or does some physical act that contributes to the result, he aids him. He may encourage him by word or deed; he may be a participant in the killing by use of words alone when he is present at the place of the crime by the influence of these words; or he may do it by the doing of acts, if the influence of these acts upon the man who draws the gun and pulls the trigger is to hasten him, if his action is expedited, or is more quickly brought into existence because of assistance of that character, if the aid is such as to embolden the perpetrator to afford him hope or confidence in his enterprise, it is aid, it is assistance, it is encouragement."

To the giving of which charge to the jury the defendant at the time excepted.

The court also among other things charged the jury as follows:

"In this case, if you find that the conduct of the defendant, in the shape of his words, in the shape of his association with Stand Rowe at the time of the killing*m*, or before that time, or after that time, from all of these things taken together, and you find that he was present at the place of the killing, and by acts or by words aided or assisted or advised or counselled or encouraged Stand Rowe in the doing of this act, it is his act as well as the act of Stand Rowe, and it is the act of both of them.

"Then it becomes necessary in this connection to settle the question (and it *is* a pertinent and relevant one) as to whether the defendant did such act or acts, or made such declaration or declarations, or actually had
346 the effect to encourage Stand Rowe to do the deed—that is to say, that he the more readily, the more quickly, the more rapidly did it because of that encouragement in the shape of acts or words from or by the defendant than he would otherwise have done it. You are required, I say, to find that condition, for it is the law, that the presence actual or constructively and the acts or words of defendant at the time of the killing, must be such as to ally him to the act; and while there is such presence he must in some way either by word or act encourage or aid in the consummation of the act, in this case the killing of Andrew J. Colvard by Stand Rowe. This law undertakes to hold all men responsible whoever intend to kill, and who so far manifest that intent by word or act as that we can take hold of this manifestation in the shape of the words or acts and get at their intent by the light of such words or acts, and if these words or acts contribute to a death which is murderous, I tell you by the rules of

the law all persons so allied to a homicide or a murder are responsible for it, and it is right they should be; because perhaps of that encouragement a man's life is destroyed, because of that aid a deadly result was brought about, because of that assistance rendered a person was caused to surrender his innocent life."

To the giving of which charge to the jury the defendant at the time excepted.

The court among other things charged the jury as follows:

"The defendant has gone on the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and above all you consider it in the light of the other facts. If he
347 is contradicted by other reliable facts, that goes against him, goes against his evidence. You may explain it perhaps on the theory of an honest mistake or a case of forgetfulness, but if there is a conflict as to material facts between his statements and the statements of the other witnesses who are telling the truth, then you would have a contradiction that would weigh against the statement of the defendant as coming from such witnesses. You are to consider his interests in this case; you are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude of course where any of us so situated would have a large interest in the result of the case—the largest, perhaps, we could have under any circumstances in life—and such an interest consequently as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore it is but right, and it is your duty to view the statement of such a witness in the light of his attitude and in the light of the other evidence."

To the giving of which charge to the jury, the defendant at the time excepted.

The defendant at this point in the court's charge requested the court to charge the jury as follows:

1st. "If the jury find that the defendant was present at the time of th killing, and that he was there with no purpose of aiding or abetting th killing by Rowe, who did the killing, then you should find the defendan not guilty.

2nd. "If the jury should believe that from the evidence that
348 the defendant's presence at the killing can be reasonably accounted for on any other reasonable hypothesis than a purpose of aiding or abetting the killing they should find the defendant not guilty.

3rd. "If the jury believe defendant said before the killing any words, and that such words so used by defendant were not used by defendant with the intention to cause Stand Rowe to shoot Colvard, they should find defendant not guilty, although they may believe that the words did cause Stand Rowe to kill Colvard."

4th. "The jury must believe, before they are warranted in finding the defendant guilty on the ground that defendant used words or acts at the time that caused Stand Rowe to kill Colvard, that defendant used the words or the acts for the purpose of encouraging the killing."

Which charges the court refused to give to the jury, but charged the jury instead thereof as follows:

"If the jury believe that the defendant was present at the time and place of the killing, and that he was there with no purpose of aiding or abetting the killing of Stand Rowe, who did the killing, then you are to find the defendant not guilty. If he went there with no purpose of that kind, then he would not be guilty. If you can consider his actions and words or declarations upon any reasonable hypothesis other than guilt, or upon the theory of innocence, it is your duty to do so; but if these words of encouragement, if they were such, if they have that influence, if these acts of encouragement, if they were of that kind and had that influence,
if they aided or assisted or abetted or encouraged Stand Rowe in the
349 shooting so that he did it even more quickly or more readily than
he would otherwise have done it when acting alone, the defendant would contribute to the result, and be equally responsible with him for it. In passing upon the question as to whether his presence was an innocent presence or not, you are to consider whether it can be explained upon the the theory of innocence; you are to consider it in the light of the facts, in the light of the evidence, and in the light of the declarations of the defendant. As to the use of words by this defendant, the defendant is held responsible for the effect of words deliberately and intentionally performed. A man is held by the law to have presumed and intended that which may follow as a necessary and natural consequence from the deliberate use of words. If the deliberate and intentional use of words has the effect to encourage one man to kill another, he who utters these words is presumed by the law to have intended that effect, and is responsible therefor. If they are words used under excitement, and consequently not deliberate, they are words that are not calculated as to produce naturally and reasonably, and probably a certain result, they do not have that effect; but words deliberately and intentionally uttered, and which produce a certain result, are held by the law to have been intended, unless they are in some way explained by the party using them, that they were hastily used or that they were not intended."

To the refusal of the court to give the charges No'. 1, 2, 3, and 4, as asked by the defendant and to the giving of the charge instead thereof the defendant at the time excepted.

The jury found the defendant guilty of murder.

Whereupon the defendant filed a motion to set aside the verdict and grant him a new trial. Which motion is in words and figures as follows:

350 United States circuit court, western district of Arkansas.

UNITED STATES
vs.
JOHN HICKS. } Motion for new trial.

Now comes the defendant and moves the court to set aside the verdict in this case and grant him a new trial, and for causes of motion assigns the following:

1st. Because the court erred in admitting evidence to the jury.

2nd. Because the court erred in instructing the jury as to the law of the case.

3rd. Because the verdict is contrary to the law.

4th. Because the verdict is contrary to the evidence; and for other good and sufficient causes.

FREDERICK & RUTHERFORD,
Attorneys for Deft.

(Endorsed on back): Filed Mch. 29, 1893. S. Wheeler, Clk. By I. M. Dodge, D. C.

The court overruled said motion and sentenced the defendant to hang, and in overruling the same the court made the following remarks:

351 UNITED STATES
vs.
JOHN HICKS.

The motion for a new trial in this case contains the following causes:

First. Because the court erred in admitting evidence to the jury.

Second. Because the court erred in instructing the jury as to the law of the case.

Third. Because the verdict is contrary to the law.

Fourth. Because the verdict is contrary to the evidence.

I am not aware of any evidence that was erroneously admitted to the jury during the trial of this case. On the contrary, I do not think any evidence went to them which should have been withheld. I think all testimony held by the court as proper to go to the jury was strictly legally competent. With this view of the testimony permitted to be heard by them, the court in setting aside the verdict for this cause would have no legal grounds on which to stand. I do not believe there was any mistake in giving the law of the case to the jury, but, on the contrary, I think it was fully, fairly, impartially, and dispassionately presented to them, and that there can be no error there. I would not, in the face of the evidence in this case, be authorized to reasonably conclude that the verdict was not supported by both the law and the evidence. For such evidence showed most clearly that Andrew J. Colvard was killed by a shot from the Winchester gun of one Stand Rowe, and that while he was preparing

352 to do this act, and while doing it, John Hicks was present, aiding, abetting, and assisting him by word and by act. This condition is established both by positive and circumstantial evidence. This state of case under the law makes Hicks a participant in the act of shooting. If the condition growing out of the actual killing by Stand Rowe is in law murder, then it is the murder of both Rowe and Hicks. I think, then, that both the law and the evidence support this verdict, and the motion for a new trial will therefore be overruled.

353 To which ruling of the court the defendant at the time excepted.

To all of which rulings of the court and instructions to the jury the defendant excepted and presented this, his bill of exceptions, and prayed that it be signed and made a part of the record in this case, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge, holding circuit court.

354 *Assignment of errors—Filed May 24th, 1893.*

United States circuit court, western district of Arkansas, February term, 1893.

UNITED STATES
vs.
JOHN HICKS. } Murder.

The defendant, John Hicks, files this, his assignment of errors committed on the trial of said cause: 1st, it was error for the court to charge the jury as follows:

"We are to proceed then to see whether the defendant was a party to the killing—that is, whether he, as connected with it, or so aided or assisted in producing the act, as under the law he is responsible by the rules of the law for that act, as well as the man who fired the fatal shot if he were alive. We go to the first proposition where the crime of murder has been committed, which asserts that he, who, with his own hand, did the act which produced the result, is guilty. The second proposition is that if at the time that Andrew J. Colvard was shot by Stand Rowe, the defendant was present at that time and at the place of the shooting. That, of course, would not alone make him guilty, the mere fact that he was present. Yet it is an element that we are to take into consideration to see whether his connection with the act of killing was such that he is guilty of the crime, because he could not be guilty unless present actually or constructively. Then we are to see whether he was present at the place of the killing. That does not mean that he had to be right at the man who was shot, right by the side of Stand Rowe, but that he was so near to that place as that he could in some way contribute to the result that was produced by
355 some act done by him or some words spoken by him. First, then, we inquire if he was present at the place of the shooting, and then while so present whether he aided, abetted, or advised, or encouraged the shooting of Andrew J. Colvard by Stand Rowe. Now, that is the second proposition I have asserted. Stand Rowe, as the proof shows beyond controversy (and when the proof shows anything beyond controversy I may allude to it in that way), is the man who fired the gun. If the defendant was actually or constructively present at that time, and in any way aided or abetted by word or by advising or encouraging the shooting of Colvard by Stand Rowe, we have a condition which under the law puts him present at the place of the crime, and if the facts show that he either aided or abetted, assisted or advised or encouraged Stand Rowe he is made a participant in the crime as thoroughly and completely as though he had with his own hand fired the shot which took the life of the man killed. That is the second condition. The law says further that if he was actually present at that place at the time of the firing by Stand Rowe, and he was there for the purpose of either aiding, abetting, advising, or encouraging the shooting of Andrew J. Colvard by Stand Rowe, and that as a matter of fact he did not do it, but was present at the place for the purpose of aiding or abetting or advising or encouraging his shooting, but he did not do it because it was not necessary, it was done without his assistance, the laws says there is a third condition where guilt is fastened to his act in that regard."

2nd. It was error for the court to charge the jury as follows:

"Now, I have given to you all these propositions, and if the de-
356 fendant occupies either one of them, and that state of case is shown by the facts and circumstances in the shape of his conduct, in the shape of his declarations, in the shape of his actions with reference to the killing, or with relation to the man who was killed, or the man who actually did the killing, this Indian, Stand Rowe, there would be guilt' as affecting him. It may be pertinent to inquire, it may be necessary to ascertain in order fully to satisfy you how a man can aid or assist or abet or encourage or counsel the killing of another in such a way as to make it a crime what he has to do to do that. If he renders encouragement to the man who does the act, if he gives him actual assistance, actual physical assistance, or does some physical act that contributes to the result, he aids him. He may encourage him by word or by deed, he may be a participant in the killing by use of words alone when he is present at the place of the crime by the influence of these words; or he may do it by the doing of acts, if the influence of these acts upon the man who draws the gun and pulls the trigger is to hasten him, if his action is expedited or is more quickly brought into existence because of assistance of that character, if the aid is such as to embolden the perpetrator to afford him hope or confidence in his enterprise, it is said, it is assistance, it is encouragement."

3rd. It was error for the court to charge the jury as follows:

"In this case if you find that the conduct of the defendant in the shape of his words, in the shape of his association with Stand Rowe at the time of the killing or before that time or after that time, from all of these things taken together, and you find that he was present at the place of the killing, and by acts or by words aided or assisted or advised or counselled or encouraged Stand Rowe in
357 the doing of this act, it is his act as well as the act of Stand Rowe and it is the act of both of them. Then it becomes necessary in this connection to settle the question (and it is apertinent and relevant one) as to whether the defendant did such act or acts or made such declaration or declarations as actually had the effect to encourage Stand Rowe to do the deed; that is to say, that he the more readily, the more quickly, the more rapidly did because of that encouragement in the shape of acts or words from or by the defendant than he would otherwise have done it. You are required, I say, to find that condition, for it is thel aw that the presence, actual or constructive, and the acts and words of the defendant at the time of the killing must be such as to ally him to the act, and while there is such presence he must in some way, either by word or act encourage, or aid in the consummation of the act, in this case the killing of Andrew J. Colvard by Stand Rowe. This law undertakes to hold all men responsible whoever intend to kill, and, who so far manifest that intent by word or act as that we can take hold of this manifestation in the shape of the words and acts, and get at their intent by the light of such words or acts, and if these words or acts contribute to a death which is murderous, I tell you by the rules of the law all persons so allied to a homicide or a murder are responsible for it, and it is right they should be, because, perhaps, of that encouragement a man's life is destroyed; because of that aid a deadly result was brought about; because of that assistance rendered a person was caused to surrender his innocent life."

4th. It was error for the court to charge the jury as follows:

"The defendant has gone upon the stand in this case and made
358 his statement. You are to weigh its reasonableness, its probability, its consistency, and above all you consider it in the light of the other evidence, in the light of the other facts. If he is contradicted by other reliable facts, that goes against him, goes against his evidence. You may explain it, perhaps, on the theory of an honest mistake or a case of forgetfulness, but if there is a conflict as to material facts between his statements and the statements of the other witnesses who are telling the truth, then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses. You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest in passing upon the truthfulness of falsity of his statement. He is in an attitude, of course, where any of us, if so situated would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest, consequently, as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore it is but right, and it is your duty to view the statements of such a witness in the light of his attitude and in the light of other evidence."

5th. It was error for the court to refuse to charge the jury asked by the defendant as follows:

"1st. If the jury find that the defendant was present at the time and place of the killing, and that he was there with no purpose of aiding or abetting the killing by Stand Rowe, who did the killing, then you should find this defendant not guilty."

359 "2nd. If the jury should believe from the evidence that the defendant's presence at the killing can be reasonably accounted for on any other reasonable hypothesis than a purpose of aiding or abetting the killing they should find the defendant not guilty."

"3rd. If the jury believe defendant said, before the killing, any words, and that such words so used by defendant were not used by defendant with the intention to cause Stand Rowe to shoot Colvard, they should find defendant not guilty, although they may believe that the words did cause Stand Rowe to kill Colvard."

"4th. The jury must believe, before they are warranted in finding the defendant guilty on the ground that defendant used words or acts at the time that caused Stand Rowe to kill Colvard, that defendant used the words or acts for the purpose of encouraging the killing."

6th. It was error for the court to charge the jury instead of charges 1, 2, 3, & 4 asked by defendant, in the following language:

"If the jury believe that the defendant was present at the time and place of the killing, and that he was there with no purpose of aiding or abetting the killing by Stand Rowe, who did the killing, then you are to find the defendant not guilty. If he went there with no purpose of that kind then he would not be guilty. If you can consider his actions and words or declarations, upon any reasonable hypothesis other than guilt or upon the theory of innocence, it is your duty to do so, but if these words of encouragement, if they were such, if they had influence, if these acts

of encouragement, if they were of that kind, and had that influence, if they aided or assisted or abetted or encouraged Stand Rowe in the shooting so that he did it even more quickly or more readily than he would
360 otherwise have done it when acting alone, the defendant would contribute to the result and be equally responsible with him for it. In passing upon the question as to whether his presence was an innocent presence or not you are to consider whether it can be explained upon the theory of innocence; you are to consider it in the light of the facts, in the light of the evidence, and in the light of the acts and in the light of the declarations of the defendant. As to the use of words by this defendant the defendant is held responsible for the effect of words deliberately and intentionally used by him as he is to be held responsible under the law for the use of acts deliberately and intentionally performed. A man is held by the law to have presumed and intended that which may follow as a necessary and natural consequence from the deliberate use of words. If the deliberate and intentional use of words has the effect to encourage one man to kill another, he who utters these words is presumed by the law to have intended that effect, and is responsible therefor. If they are words used under excitement and consequently not deliberate, they are words that are not calculated as to produce naturally and probably a certain result, they do not have that effect; but words deliberately and intentionally uttered and which produce a certain result are held by the law to have been intended unless they are in some way explained by the party using them, that they were hastily used or that they were not intended."

7th. It was error for the court to overrule defendant's motion for a new trial.

8th. It was error for the court to sentence the defendant.

361 Wherefore, the above-stated errors considered, the said defendant prays that the judgment and sentence against him be reversed and a new trial be granted him.

JOHN HICKS.
By FREDERICK & RUTHERFORD,
His attorneys.

362 *Petition for writ of error—Filed May* 24, 1893.

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
JOHN HICKS. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, John Hicks, represents that at the Feb'y term, 1893, of said court he was convicted on an indictment charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner upon the verdict of the jury convicting him as aforesaid: Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error, to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said

cause, removing said cause and the record therein to the said Supreme Court in order that the same may be there examined, and if error be found that judgment and sentence against him therein may be reversed.

JOHN HICKS.
By FREDERICK & RUTHERFORD,
His attorneys.

363 *Affidavit of poverty, filed May* 24, 1893.

United States circuit court, western district of Arkansas. February term, 1893.

UNITED STATES
vs.
JOHN HICKS. } Murder.

I, John Hicks, the defendant in the above-stated cause, do solemnly swear that I am not possessed of sufficient means and am not worth $10.00 above my wearing apparel, and am unable to procure the same to prosecute the appeal taken in said cause in the Supreme Court of the United States. I therefore pray that it be prosecuted in forma pauperis.

JOHN HICKS.

Subscribed and sworn to before me this 29th day of April, 1893.
STEPHEN WHEELER, *Clk.*
By I. M. DODGE, *D. C.*

364 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States of America and John Hicks, a manifest error hath happened, to the great damage of the said John Hicks, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 27th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western District of Arkansas.

Allowed by

Justice of the Supreme Court of the United States.

365 UNITED STATES OF AMERICA, *ss:*

To James F. Read, United States district attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein John Hicks, under indictment for murder, is plaintiff in error, and the United States, defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable I. C. Parker, judge of the district court of the United States for the western district of Arkansas, this 29 day of June, in the year of our Lord one thousand eight hundred and ninety-three.

I. C. PARKER,
U. S. District Judge, holding Circuit Court.

366 On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared , before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I, Jas. F. Reed, U. S. dist. atty. for the western district of Arkansas, hereby accept service of the within citation this 29th day of June, 1893.

JAS. F. REED,
Dist. Atty.

367 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record in the case of United States vs. John Hicks. The original of which remains of record in my office.

I testimony whereof I hereunto set my hand and affix the seal of said court at Fort Smith, in said district, this 7th day of July, A. D. 1893.

[SEAL.] STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsement on cover:) W. Arkansas. C. C. U. S. Case No. 15355. Term No. 971. John Hicks, plaintiff in error, vs. The United States. Supreme Court, U. S. Clerk's office. Received Jul. 22, 1893. Filed July 22nd, 1893.

OCT
JAMES H. McKENNEY
CLERK

150-433

IN THE SUPREME COURT OF

JOHN HICKS, PLAINTIFF IN ERROR.

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of

Attorney for Plaintiff in Error.

J. B. CAIN, LEGAL PRINTER, 27 SOUTH 4TH ST.

THE LAW ASSOCIATION
OF
PHILADELPHIA

No 971

IN THE SUPREME COURT OF THE UNITED STATES

JOHN HICKS, PLAINTIFF IN ERROR.

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

ABSTRACT.

John Hicks, the plaintiff in error, was at the November term, 1892, of the United States Circuit Court for the Western District of Arkansas, jointly indicted with Stand Rowe for the murder of Andrew J. Colvard. Record page 1.

At the February term 1893 the plaintiff in error was put upon his trial and convicted of murder.

The facts are substantially as follows:

On the night of the 12th of February 1892, in the Cherkee Nation, there was a dance at Jim Rowe's. A good many persons were at the dance that night. Stand Rowe, brother of Jim Rowe, the deceased A. J. Colvard and plaintiff in error were there, Colvard was drinking considerably. Record pages 6 and 7.

The people there were mostly Cherokees and talked in Cherokee. Record page 39,

Hicks, Rowe and Colvard all talked Cherokee. Record page 45.

Several of these witnesses testified through an interpreter. Record pages 49, 62, 88.

John Hicks was sober, did not drink at all. Record. page 145.

The next morning, the 13th, quite a crowd of these Cherokees, (among whom was Stand Rowe and Colvard,) were drunk. Jim Rowe asked John Hicks to take Stand Rowe out of the crowd and take him away because he feared the officers might arrest him. Record page 90.

John Hicks and A. J. Colvard rode away from the place of the dance. Colvard rode ahead of Hicks and met Rowe in the road, and after a little parleying, Rowe shot Colvard, then Rowe and Hicks rode off together. Record page 37.

Hicks and Colvard were friendly. Record page 93.

Stand Rowe seemed to be friendly with Colvard. Record page 90.

Hicks was the only sober man in the crowd, and had nothing to do with the killing. He was unfortunate in being there. He had no motive or feeling to prompt him to

injure Colvard or any one else.

There are eight assignments of errors to the courts charge to the jury, as follows:

1st, It was error for the court to charge the jury as follows:

"We are to proceed then to see whether the defendant was a party to the killing—that is, whether he, as connected with it, or so aided or assisted in producing the act, as under the law he is responsible by the rules of the law for that act, as well as the man who fired the fatal shot if he were alive. We go to the first proposition where the crime of murder has been committed, which asserts that he, who with his own hand, did the act which produced the result, is guilty. The second proposition is that if at the time that Andrew J. Colvard was shot by Stand Rowe, the defendant was present at that time and at the place of the shooting. That, of course, would not alone make him guilty, the mere fact that he was present. Yet it is an element that we are to take into consideration to see whether his connection with the killing was such that he is guilty of the crime, because he could not be guilty unless present actually or constructively. Then we are to see whether he was present at the place of the killing. That does not mean that he had to be right at the man who was shot, right by the side of Stand Rowe, but that he was so near to that place as that he could in some way contribute to the result that was produced by some act done by him or some words spoken by him. First then, we inquire if he was present at the place of the shooting, and then while so present whether he aided, abetted, or advised, or encouraged the shooting of Andrew J. Colvard by Stand Rowe. Now, that is the

second proposition I have asserted. Stand Rowe, as the proof shows beyond controversy (and when the proof shows anything beyond controversy I may allude to it in that way), is the man who fired the gun. If the defendant was actually or constructively present at that time, and in any way aided or abetted by word or by advising or encouraging the shooting of Colvard by Stand Rowe, we have a condition which under the law puts him present at the place of the crime, and if the facts show that he either aided or abetted, or advised or encouraged Stand Rowe he is made a participant in the crime as thoroughly and completely as though he had with his own hand fired the shot which took the life of the man killed. That is the second condition. The law says further that if he was actually present at that place at the time of the firing by Stand Rowe, and he was there for the purpose of either aiding, abetting, advising, or encouraging the shooting of Andrew J. Colvard by Stand Rowe, and that as a matter of fact he did not do it, but was present at the place for the purpose of aiding or abetting or advising or encouraging his shooting, but he did not do it because it was not necessary, it was done without his assistance, the law says there is a third condition where guilt is fastened to his act in that regard." Record pages 212 and 217.

2nd, It was error for the court to charge the jury as follows:

"Now, I have given you all these propositions, and if the defendant occupies either one of them, and that state of case is shown by the facts and circumstances in the shape of his conduct, in the shape of his declarations, in

the shape of his actions with reference to the killing, or with relation to the man who was killed, or the man who actually did the killing, this Indian, Stand Rowe, there would be guilt as affecting him. It may be pertinent to inquire, it may be necessary to ascertain in order fully to satisfy you how a man can aid or assist or abet or encourage or counsel the killing of another in such a way as to make it a crime what he has to do to do that. If he renders encouragement to the man who does the act, if he gives him actual assistance, actual physical assistance, or does some physical act that contributes to the result, he aids him. He may encourage him by word or deed, he may be a participant in the killing by use of words alone when he is present at the place of the crime by the influence of these words; or he may do it by the doing of acts, if the influence of these acts upon the man who draws the gun and pulls the trigger is to hasten him, if his action is expedited or is more quickly brought into existence because of assistance of that character, if the aid is such as to embolden the perpetrator to afford him hope or confidence in his enterprise, it is aid, it is assistance, it is encouragement." Record pages 213 and 218.

3rd, It was error for the court to charge the jury as follows:

"In this case if you find that the conduct of the defendant in the shape of his words, in the shape of his association with Stand Rowe at the time of the killing or before that time or after that time, from all of these taken together, and you find that he was present at the place of the killing, and by acts or words aided or assisted

or advised or counselled or encouraged Stand Rowe in the doing of this act as well as the act of Stand Rowe and it is the act of both of them. Then it becomes necessary in this connection to settle the question (and it is a apertinent and relevant one) as to whether the defendant did such act or made such declaration or declarations as actually had the effect to encourage Stand Rowe to do the deed; that is to say, that he the more readily, the more quickly, the more rapidly did because of that encouragement in the shape of acts or words from or by the defendant than he would otherwise have done it. You are required, I say, to find that condition, for it is the law that the presence, actual or constructive, and the acts and words of the defendant at the time of the killing must be such as to ally him to the act, and while there is such presence he must in some way, either by word or act encourage, or aid in the consummation of the act, in this case the killing of Andrew J. Colvard by Stand Rowe. This law undertakes to hold all men responsible whoever intend to kill, and, who so far manifest that intent by word or act as that we can take hold of this manifestation in the shape of words and acts, and get at their intent by the light of such words or acts, and if these words or acts contribute to a death which is murderous, I tell you by the rules of the law all persons so allied to a homicide or a murder are responsible for it, and it is right they should be, because, perhaps, of that encouragement a man's life is destroyed; because of that aid a deadly result was brought about; because of that assistance rendered a person was caused to surrender his innocent life." Record pages 213 and 218.

4th, It was error for the court the charge the jury as

follows:

"The defendant has gone upon the stand in this case and made his statement. You are to weigh its reasonableness, its probability, its consistency, and above all you consider it in the light of the other evidence, in the light of the other facts. If he is contradicted by other reliable facts, that goes against him, goes against his evidence. You may explain it, perhaps, on the theory of an honest mistake or a case of forgetfulness, but if there is a conflict as to material facts between his statements and the statements of the other witnesses who are telling the truth, then you would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses. You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest, consequently, as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore it is but right, and it is your duty to view the statements of such a witness in the light of his attitude and in the light of other evidence." Record pages 214 and 219.

5th, It was error for the court to refuse to charge the jury as asked by the defendant as follows:

"1st. If the jury finds that the defendant was present

at the time and place of the killing, and that he was there with no purpose of aiding or abetting the killing by Stand Rowe, who did the killing, then you should find this defendant not guilty."

"2nd. If the jury should believe from the evidence that the defendant's presence at the killing can be reasonably accounted for on any other reasonable hypothesis than a purpose of aiding or abetting the killing they should find the defendant not guilty."

"3rd. If the jury believe defendant said, before the killing, any words, and that such words so used by defendant were not used by defendant with the intention to cause Stand Rowe to shoot Colvard, they should find defendant not guilty, although they may believe that the words did cause Stand Rowe to kill Colvard."

"4th. The jury must believe, before they are warranted in finding the defendant guilty on the ground that defendant used words or acts at the time that caused Stand Rowe to kill Colvard, that defendant used the words or acts for the purpose of encouraging the killing. Record pages 214 and 219.

6th, It was error for the court to charge the jury instead of charges 1, 2, 3 and 4, asked by defendant, in the following language:

"If the jury believe that the defendant was present at the time and place of the killing, and that he was there with no purpose of aiding or abetting the killing by Stand Rowe, who did the killing, then you are to find the defendant notguilty. If he went there with no purpose of that kind then he would not be guilty. If you can consider his

actions and words or declarations, upon any reasonable hypothesis other than guilt or upon the theory of innocence it is your duty to do so, but if these words of encouragement, if they were such, if they had influence, if these acts of encouragement, if they were of that kind, and had that influence, if they aided or assisted or abetted or encouraged Stand Rowe in the shooting so that he did it even more quickly or more readily than he would otherwise have have done it when acting alone, the defendant would contribute to the result and be equally responsible with him for it. In passing upon the question as to whether his presence was an innocent presence or not you are to consider whether it can be explained upon the theory of inno cence; you are to consider it in the light of the facts, in the in the light of the evidence, and in the light of the acts and in the light of the declarations of the defendant. As to the use of words by this defendant the defendant is held responsible for the effect of words deliberately and intentionally used by him as he is to be held responsible under the law for the use of acts deliberately and intentionally performed. A man is held by the law to have presumed and intended that which may follow as a necessary and natural consequence from the deliberate use of words. If the deliberate and intentional use of words has the effect to encourage one man to kill another, he who utters these words is presumed by the law to have intended that effect, and is responsible therefor. If they are words used under excitement and consequently not deliberate, they are words that are not calculated to produce naturally and probably a certain result, they do not have that effect; but words

deliberately and intentionally uttered and which produce a certain result are held by the law to have been intended unless they are in some way explained by the party using them, that they were hastily used or that they were not intended." Record pages 214 and 220.

7th, It was error for the court to overrule defendant's motion for a new trial.

8th, It was error for the court to sentence the defendant.

ARGUMENT.

Our objection to the charge of the court, as contained in the first assignment of error, is that the court failed to tell the jury, that "if defendant was actually present at that time, and in any way" *purposely or intentionally* aided by encouraging Rowe to do the killing, guilt would follow. The defendant if he did anything that had the effect to encourage Rowe, who did the killing, must have done it with the intent to have Rowe shoot and kill Colvard. "Malice is an essential element in the crime of murder" and it may be presumed from the use of a deadly weapon." But no such presumption can, or could have been indulged, in this case, because the defendant did no act from which malice could be inferred.

In the 2nd assignment of error the court tells the jury that "he (defendant) may be a participant in the killing by use of WORDS ALONE, when he is present at the place of the crime by the influence of these words." Record page 218.

But we ask, if defendant used words, not ordinarily calculated to incite to crime, or if he used such words

alone to one over whom he had no authority, does the law presume that he used such words with a felonious *intent?* Was it not proper to charge the jury that they must find that he used the words with the *intent* to cause Rowe to kill Colvard?

Again, in the 3rd assignment of error, the court told the jury that it was "necessary, in this connection to settle the question as to whether the defendant did such act or acts, or made such declaration or declarations, as actually had the effect to encourage Stand Rowe to do the deed; that is to say, that he, the more readily, the more quickly, the more rapidly did it because of that encouragement, in the shape of acts or words, from or by the defendant, than he otherwise would have done it." We ask, does not the *law* require that the acts done, or the words spoken should be done or spoken with the *intent* to cause the death of deceased?

The court ought to have charged the jury as asked by the defendant, as set out in the 5th assignment of error. Nos. 1, 2, 3 and 4. These instructions, if given would have informed the jury that a mere idle act or thoughtless word, although such had a tendency to quicken the act of Rowe, would not make the defendant guilty. But instead of giving them as asked, the court told the jury that, "if they (acts or words) were of that kind, and had that influence, if they aided or assisted, or abetted or encouraged Stand Rowe, in the shooting, so that he did it even more *quickly* or more *readily* than he would otherwise have done it, when acting alone, the defendant would contribute to the result, and be equally responsible with him for it."

In other words, if the defendant said anything or did anything, no matter how innocently, or no matter whether he *intended* his words or acts to accelerate the killing by Rowe or not. Yet the defendant is as guilty as Rowe—both guilty of murder.

In this charge (Record page 220) the court says, if what the defendant did "had the effect to *quicken* the shooting by Rowe, the defendant would be guilty of murder, "he would contribute to the result and be equally responsible with him (Rowe) for it." Is this the law? Can a man commit murder without an *intention* so to do? Can there be a crime without an *intent*? When the law says, "a sane man must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts," it simply announces a rule of evidence, and does not preclude the necessity of telling the jury that they must find *intent* from the evidence before they can convict."

"But when *intent* is the gist of the crime, (as in case of murder) this presumption, though a very important circumstance in making the proof necessary upon this point to convict, is not conclusive, nor alone sufficient, and should be supplemented by other testimony to avoid a reasonable doubt,"

People vs. Sweeney, 55 Mich. 586.

The court further on in the same charge, at pages 220, said: "A man is held by the law to have presumed and intended that which may follow as a necessary and natural consequence from the deliberate use of words."

What are "the necessary and natural consequence of

words?" Is *death* or *murder*? Can a man kill another by words? The law is not that way. The law says, "presence and *participation* are necessary to constitute a person an abettor."

1 Am. and Eng. En. Law 63.

Com. vs. Knapp, 9 Pick. 496.

Connaughty vs State, 1 Wis. 169.

To abet is to *incite* a person to commit a crime, an abettor is a person who, being present or in the neighborhood, *incites* another to commit a crime, and thus becomes a principal. "The aider and abettor must *participate* in the felony, in the sense of acting in concert with those committing it; for, although, he is present, yet, if he does not *participate* but remains passive, he is not an abettor. Moreover, the *participation* must be with a *felonious intent*, and not in ignorance of the nature of the act."

White vs People 81 Ill. 333.

Sharp vs State, 6 Tex. App. 650.

State vs Kirk, 10 Oregon 505.

Clan vs State, 33 Ind. 418.

When a reasonable doubt exists as to a person's *intention* in interfering in a struggle between two persons he can not be held to aid and abet."

Gailford vs State 24 Ga, 315.

"But the mere fact of presence, or failure to interfere

to prevent the commission of a crime, does not *alone* constitute the person a joint criminal with the active party, or cast on him the burden of proving his innocence.

1 Am. and Eng. En. Law, 63.

"He must do, or say something, showing consent to the felonious purpose, and must *contribute* to its execution."

State vs Heldreth, 9 Ired, N. C. 440.

S. C. 51 Am. Dec. 369.

White vs People, 81 Ill. 333.

"When the existence of a particular *intent* forms part of the definition of an offense [as in the case at bar,] a person charged with aiding and abetting the commission of the offense, must be *shown* to have known of the existence of the *intent* on the part of the person so aided."

1 Am. and Eng. En. Law, 64.

Stephens Dig. Cr. L. Am. Ed. 26.

"If B and C have had a quarrel with A, and A approaches B and C and B commands him to halt or he will shoot him, and and C then shoots A, the circumstances do not necessarily import a common criminal *intent* between B and C to kill A, so far as to make B guilty."

People vs Leith, 52 Cal. 251.

Savage vs State, 18 Fla. 909.

"Words amounting to a *bare permission* will not render a

man an accessory; as if A says he will kill J. S. and B says 'you may do your pleasure for me.'"

Hawk P. C. B. 2 C. 29 S. 16.

"Knowledge that a person *intends* to commit a crime, and conduct connected with, and influenced by such knowledge is not enough to make the person who posses such knowledge, or so conducts himself, an accessory before the fact, to such crime, unless he *does* something to encourage its commission actively.

1 Am. and Eng. En. Law 68.

With regard to the court's charge as contained in the 4th assignment of errors. (Record pages 219). We think the court erred in telling the jury that "he (defendant) is in an attitude of course, where any of us, if so situated, would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest, consequently, as might causeus to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire." This was an argument to the jury against the credibility of the defendant's testimony. It might have been well enough for the district attorney to have made such an argument—as an argument—but coming from the court as the law of the case we apprehend that the jury took it as the law that they should not believe him. If congress, when it passed the law allowing a defendants to testify in his own behalf, intended that he should not be believed, then the law is a mockery

and a snare. We apprehend that this law, allowing a defendant to testify in his own behalf, was simply meant to make defendants competent witnesses in their own cases, and that it left their evidence, as any other witness, the credibility to be weighed by the jury by the same rules as that of any other witnesses.

The Act of Congress Sections 1342, 1624, 20 U. S. Stats; 1 Sup. Rev. Stats. 312, says that in the trials of all indictments, etc., * * * * the person so charged shall at his own request, but not otherwise be a *competent* witness."

"If a person accused of crime testifies in his own behalf, he is to be treated as any other witness; and if he fails to deny a material fact which has been testified against him, the district attorney may comment upon such omission in his argument. In such case the jury should weigh the testimony of the defendant as that of any other witness, and consider his interest in the result of the case."

4 Am. and Enc. L. p. 870.

"A charge that if the jury believe defendant, as a witness, has testified falsely, then they have the right to disregard his evidence, is erroneous, as omitting the essential element "wilfully and corruptly."

Bantom vs People, 114 *Ill.* 505.

"An instruction which, in the language used, is equivalent to telling the jury that it was their duty to keep in mind that the witness was the defendant, and that his testimony, for that reason, could not be taken as of controlling weight unless consistent with all the facts and circum-

stances in evidence, is erroneous, as discrediting the witness. The defendant has a right to put his evidence before the jury unprejudiced by any adverse criticism of the court."

Bird vs State 107 Ind. 54.

"In a criminal trial it is error for a court to instruct the jury that it may at pleasure, and without regard to the considerations, reject the evidence wholly or in part of any witness interested in the case or having any motive to swear falsely, unless such witness be corroborated by other evidence, and such instruction is erroneous as much when aimed at a defendant who testifies as any other witness."

Owens vs State, 63 Miss. 450.

For these reasons, we submit this case to the court, confident, that for the many errors committed and shown, to the prejudice of the plaintiff in error, the case should be reversed and a new trial awarded.

Respectfully Submitted.

A. H. GARLAND,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
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CLERK.

150-433

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN HICKS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 971.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN HICKS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
No. 971.

In the circuit court of the United States for the western district of Arkansas the plaintiff in error, John Hicks, was indicted jointly with Stand Rowe, both being Indians, for the murder of Andrew J. Colvard, a white man, by shooting him with a gun, on the 13th of February, 1892.

Stand Rowe was killed by the officers in the attempt to arrest him, and the plaintiff in error was tried separately in March, 1893.

The assignments of error on pages 217–220, eight in number, are as follows, treating them in the inverse order from that in which they are stated in the record:

1. It was error for the court to sentence the defendant.

We are at a loss to know what is meant by this assignment of error. The prisoner having been tried by a jury, and a verdict of guilty found against him, there was nothing left for the court to do but sentence him. There may have been error in the rulings of the court, or in its charge

to the jury. The verdict may be altogether contrary to the evidence in the case, yet after the court had refused to set aside that verdict, it was bound to enter up judgment upon it, and the only proper judgment on the verdict was the sentence complained of.

2. It was error for the court to overrule defendant's motion for a new trial.

This court has uniformly held that as a motion for a new trial in the courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion can not be assigned for error here (*Railway Co.* v. *Heck*, 102 U. S., 120).

3. It was error for the court to refuse to charge the jury, as asked by the defendant in the fifth assignment of error. (Page 219.)

The substance of the four instructions asked for is embraced in the charge given by the court to the jury, and is stated by the court in more accurate and less misleading terms than in the instructions asked for. The first two of these instructions are expressed in very obscure terms. They direct the jury to find the defendant not guilty if they believe he was present at the place of the killing "with no purpose of aiding or abetting the killing;" or, "if defendant's presence at the killing can be accounted for on some other hypothesis than a purpose to aid or abet the killing."

It will be readily seen how liable this language is to mislead the jury. It assumes that the purpose of the defendant must have been to procure the killing of the deceased, in order to justify his conviction, whereas, in

fact, had he been without any fixed and definite purpose to procure the death of the deceased, but with a distinct purpose to aid and abet a criminal assault upon him, which assault naturally led to his death, he would be guilty of the killing.

And so is it true as to the fourth instruction asked for, that although the "defendant used words or acts at the time that caused Stand Rowe to kill Colvard, yet unless they find that he used such words or acts for the purpose of encouraging the killing," they cannot convict him. Now, here, the defendant may have had no purpose of encouraging a killing, but if he had a purpose of encouraging Stand Rowe to do the act which resulted in the killing he is guilty.

It will be observed that these four instructions were asked by the defendant as one single charge to be given to the jury.

In *United States* v. *Hough* (103 U. S., 72, 73), this court said:

> According to the well-settled rule of this court, if either of these four propositions was erroneous, or, in other words, if all the charge thus asked was not sound law, the court did right in refusing the prayer which presented them as a whole.

But any such criticism upon the form of the instructions asked for by the defendant is made unnecessary by the fact appearing on page 211, that the court actually gave the instructions asked for, but with such modification and accompanying statement to the jury as relieved them of the objection which attached to them in their original form.

4, 5, 6, 7, 8. The ground of error in the remaining assignments is as to the charge given by the court to the jury.

The difficulty which confronts us in the consideration of these assignments of error applies, indeed, to the whole case, and makes it exceedingly perilous for the reviewing court to attempt to pass upon the case at all on appeal from the judgment of the court below.

In this record of 222 printed pages it will be seen that the only bill of exceptions taken at all in the case begins on page 5; and if it can be said to have any conclusion whatever it is on page 216, where the signature of the judge who presided at the trial is found appended to what appears to be a distinct entry made in the record of the proceedings. It there appears that—

> The court overruled said motion and sentenced the defendant to hang, and in overruling the same the court made the following remarks:
>
> UNITED STATES
> *v.*
> JOHN HICKS.
>
> The motion for a new trial in this case contains the following causes.

Then follow the four grounds on which the motion for a new trial was made; then the opinion of the court on that motion.

The paper concluding as follows:

> To which ruling of the court the defendant at the time excepted.
>
> To all of which rulings of the court and instructions to the jury the defendant excepted, and pre-

sented this his bill of exceptions and prayed that it be signed and made a part of the record in this case, which is accordingly done.

I. C. PARKER,
U. S. District Judge, holding Circuit Court.

The specific matter presented to the court, and on which its ruling was made, was the motion for a new trial, and this, as we have seen, can not be considered here as a reviewable error.

Just what is embraced in the further statement, "to all which rulings of the court and instructions to the jury the defendant excepted," is very obscure.

What rulings of the court are referred to here? Will this court on appeal scrutinize the testimony contained between pages 5 and 183, to discover errors in the ruling of the court on the admissibility of evidence? There is no certificate by the judge who presided at the trial as to the evidence at all, unless it be that the statement which appears on page 183, at the conclusion of the testimony of the last witness, "this was all the evidence in the case," be accepted by this court as a sufficiently authenticated certificate, although it is nowhere referred to in the paper on page 216, which is signed by the judge.

Again, what "instructions to the jury" are referred to in this bill of exceptions? The language is, "to all of which instructions of the jury." Now, the instructions to the jury are embraced in the charge of the court found on pages 183–211. Can this court be expected to explore that entire charge for the discovery of error?

It is true that certain portions of that charge appear to have been excepted to by the defendant at the time it was

given, and these portions are set out in the "assignment of errors;" but they are not otherwise specified or indicated as grounds of the error complained of, and even as to the portions of the charge thus complained of, as well as to the instructions asked for by the defendant and refused by the court; it is true that no part of the evidence in the case tending to show the relevancy or irrelevancy of the instructions refused or given by the court is stated in connection with such instructions.

This court held, in *Worthington* v. *Mason* (101 U. S., 149), that when error is assigned upon the instructions given and those refused the bill of exceptions must set forth so much of the evidence as tends to prove the facts out of which the question is raised to which the instructions apply. Every bill of exceptions taken to the ruling of a court in granting or refusing an instruction should present so much of the evidence in the case as tends to prove the facts which render the instruction relevant.

It is true that this case, unlike *Worthington* v. *Mason*, *supra*, does contain in this single bill of exceptions all the testimony delivered on the trial, as well as the entire charge delivered by the court to the jury. And this court might, by patience and diligence, discover somewhere in this mass of testimony some part of it to which the instructions were relevant; but it has repeatedly declined to take such a burden upon itself, and has stated that—

> The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party in order to entitle himself to such revision must not only allege

> exceptions at the trial or hearing, but he must draw up those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains. * * * Minutes of the judge or clerk, or notes of a stenographer, can not take the place of a bill of exceptions, but are only memoranda, by the aid of which one may afterwards be drawn up. (*Hannah* v. *Maas*, 122 U. S., 24.)

In *Dunlop* v. *Monroe* (7 Cranch, 242, 270) it was said by this court that—

> Each bill of exceptions must be considered as presenting a distinct and substantive case. (See, too, *Railroad Co.* v. *Varnell*, 98 U. S., 479.)

Here is one bill of exceptions only; and it is sought by that single bill to present every question of error, of law and fact in this case.

AS TO THE ERRORS OF LAW COMPLAINED OF.

1 (p. 217). This portion of the charge states, in substance, that the mere presence of the defendant at the time and the place of the shooting could not make him guilty: but, that if being present, he aided, abetted, advised, or encouraged the shooting of Colvard by Stand Rowe, although he himself did not do it, yet is he guilty of the murder.

The indictment here charges the defendant with the murder.

In *United States* v. *Wilson* (1 Baldwin's Rep., 178), it was held:

> If a person be present consenting, aiding, procuring, advising, or assisting the commission of a crime,

> he is a principal and may be indicted as such. * * * But each person present consenting to the commission of the offense, and doing any one act which is either an ingredient of the crime or immediately connected with or leading to its commission, is as much a principal as if he had with his own hands committed the whole offense.

And in *United States* v. *Hanway* (2 Wall., Jr., 139–208):

> When a murder is committed all who were present aiding, abetting, and assailing, are equally guilty with him who gave the fatal stroke. An abettor of a murder, in order to be held liable as a principal in the felony, must be present at the transaction; if he is absent he may be an accessory.

The charge complained of is in substantial accordance with these cases.

2 and 3. The portions of the charge complained of in these two assignments state in substance that the assistance rendered to the man who actually does the killing by one who is present at the killing may be by the use of words alone; and

> If his action is expedited, or more quickly brought into existence, because of assistance of that character; if the aid is such as to embolden the perpetrator to afford him hope or confidence in his enterprise, it is said it is assistance, it is encouragement.

And, again:

> I tell you by the rules of the law all persons so allied to homicide or a murder are responsible for it, and it is right they should be; because, perhaps, of that encouragement a man's life is destroyed; be-

> cause of that aid a deadly result was brought about; because of that assistance rendered a person was caused to surrender his innocent life.

There can be no doubt of the soundness of these propositions. Aid, encouragement, and assistance may be afforded often more efficiently by words than by deeds. The hand which holds the knife or the pistol may, for a time be paralyzed by fear or by a sense of wickedness and may derive its courage and strength from words which convey either taunts or exhortation. The soldier is stimulated to deeds of heroism by the words of a trusted commander. The poltroon may be urged to the commission of crime by the threats or flattering words of his accomplice.

> Language addressed to persons immediately before committing an offense, actually intended by the speaker to incite those addressed to commit it, is such counseling or advising to the crime as the law contemplates, and the person so inciting others may be indicted as principal. (*Charge to grand jury*, 2 Curtis, 637.)

4. The objection to this part of the charge is as to the comments of the court upon the attitude of the defendant as a witness in his own behalf. The attention of the jury was directed to the fact that the witness was the defendant in the cause, and they are told that if he is corroborated by the other testimony in the case his own testimony is to that extent strengthened. But—

> If he is contradicted by other reliable facts, that goes against him. You may explain it, perhaps, on the theory of an honest mistake or a case of forgetfulness; but if there is a conflict as to material facts

> between his statements and the statements of the other witnesses who are telling the truth, then you would have a contradiction that would weigh against the statements of defendant as coming from such witnesses. You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest, in passing upon the truthfulness or falsity of his statement.

Manifestly, there is nothing in this charge which conveys to the jury the opinion of the court on the weight of the testimony. The statements are all made hypothetically.

In *United States* v. *Chapels* (2 Wheeler, 205), it was said:

> The testimony of accomplices is to be heard with suspicion; and if their testimony should be improbable, or contradicted by circumstances or by other testimony, the jury may discredit it. But if all the circumstances of the case corroborate the testimony of an accomplice and are, in fact, merely connected by that testimony, the facts supplied by that accomplice are not to be regarded.

So *United States* v. *Kessler* (1 Baldwin, 15–25).

It is only in very recent years that one charged with the commission of a crime has been allowed to testify in his own behalf, and, while no comment is allowed upon his failure to appear as a witness for himself, yet when he does so appear he becomes himself a fact in the case, and as a legitimate subject for comment, as a deed with interlineations or erasures on its face, or as any other witness who appears to be nearly related by blood, or otherwise, to the party accused.

And when an accomplice is called to testify on behalf of the Government it is said:

> That when a verdict is rendered exclusively on such testimony it should be set aside by the court, and that it is the duty of the court on the trial to advise the jury not to convict on the evidence of an accomplice who is uncorroborated. (Whar. Crim. Ev., 8th ed., sec. 441.)

THE FACTS OF THE CASE.

It appears that on the night of the 12th of February, 1892, there was a dance at the house of Jim Rowe, in the Cherokee Nation; that Jim Rowe was a brother to Stand Rowe, who was indicted jointly with the defendant; that a large number of men and women were in attendance; that the dance continued until near sunrise the morning of the 13th; that Stand Rowe and the defendant were engaged in what was called "scouting," viz, eluding the United States marshals who were in search of them with warrants for their arrest, and were armed for the purpose of resisting arrest; they appeared at the dance, each armed with a Winchester rifle; they were both Cherokee Indians. The deceased, Andrew J. Colvard, was a white man who had married a Cherokee woman; he had been engaged in the mercantile business in the Cherokee country until a few months before the homicide; he came to the dance on horseback on the evening of the 12th. A good deal of whisky was drank during the night by the persons present, and Colvard appears to have been drunk at some time during the night. Colvard spoke Cherokee fluently and appears to have been very friendly with Stand Rowe and the defendant Hicks.

On the morning of the 13th, as the party were dispersing, Colvard invited Stand Rowe and Hicks to go home with him and repeated frequently this invitation. Finally, he offered as an inducement to Stand Rowe, if he would accompany him home, to give him a suit of clothes, and a hat and boots. The urgency of these invitations appears to have excited the suspicion of the defendant in error, who declared, openly, that if Colvard persisted in his effort to take Stand Rowe away with him that he would shoot him.

Some time after sunrise on the morning of the 13th, about 7 o'clock, S. J. Christian, Benjamin F. Christian, Wm. J. Murphy, and Robert Murphy, all of whom had been at the dance the night before and had seen there Colvard, Stand Rowe, and the defendant, were standing on the porch of the house of William J. Murphy, about 414 steps west from the house of Jim Rowe, and saw Stand Rowe, coming on horseback in a moderate walk, with his Winchester rifle lying down in front of him, down a "trail," which led into the main traveled road. Before Stand Rowe appeared in sight the men who were on the porch had heard a "whoop" in the direction from which Stand Rowe came, and this "whoop" was responded to by one from the main road in the direction of Jim Rowe's house. Stand Rowe halted within five or six feet of the main road and the men on the porch saw Mr. Colvard and the defendant Hicks riding together down the main road from the direction of Jim Rowe's house.

As Colvard and Hicks approached the point where Stand Rowe was sitting on his horse, Stand Rowe rode out into the road and halted. Colvard then rode up to

him in a lope or canter, leaving Hicks, the defendant, some 30 or 40 feet in his rear. The point where the three men were together on their horses was about 100 yard from where the four witnesses stood on the porch. The conversation between the three men on horseback was not fully heard by the four men on the porch and all that was heard was not understood, because part of it was carried on in the Cherokee tongue; but some part of this conversation was distinctly heard and clearly understood by these witnesses; they saw Stand Rowe twice raise his rifle and aim it at Colvard, and twice he lowered it; they heard Colvard say, "I am a friend to both of you;" they saw and heard the defendant Hicks laugh aloud when Rowe directed his rifle toward Colvard; they saw Hicks take off his hat and hit his horse on the neck or shoulder with it; they heard Hicks say to Colvard, "Take off your hat and die like a man" (pp. 10, 27, 37, 44); they saw Stand Rowe raise his rifle for the third time, point it at Colvard, fire it; they saw Colvard's horse wheel and run back in the direction of Jim Rowe's house, 115 or 116 steps; they saw Colvard fall from his horse; they went to where he was lying in the road and found him dead; they saw Stand Rowe and John Hicks ride off together after the shooting.

And these things which these four men saw and testified to are not disputed or contradicted by any witness examined in this case, save John Hicks, the defendant, when testifying in his own behalf. And he, in his testimony admits, substantially, all that was done, except the striking his horse with his hat, and admits, too, nearly all that the witnesses testify to having heard, but denies that

the things spoken were said by him. His testimony, however, is so overwhelmingly contradicted by nearly every other witness in the case as to the circumstances of the whole affair as to render it altogether untrustworthy.

The attentive reading of all the testimony leaves the mind without a doubt that the plaintiff in error here was guilty of the willful, deliberate, and premeditated murder of Colvard; not indeed by his own hand, but by previous advice to and active present coöperation with Stand Rowe, both, it may be, moved to the commission of this deed by the erroneous impression that Colvard was seeking to procure their arrest. This erroneous belief can neither excuse nor extenuate the crime.

HOLMES CONRAD,
Assistant Attorney-General.